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No.

In The

Supreme Court of the United States

October Term, 1984

KAREN FRANCES ULANE, *Petitioner,*

vs.

EASTERN AIR LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals seriously abused its authority by reversing the District Court's findings of fact that the Petitioner was a female and that she was discriminated against based on sex in violation of Title VII of the Civil Rights Act of 1964, without applying the standard of review required by Federal Rule of Civil Procedure 52(a) and this Court's decision in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

2. Whether transsexuals are protected under Title VII of the Civil Rights Act of 1964 against discrimination based on change of sex.

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PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

Petitioner-Plaintiff respectfully requests the issuance of a writ of certiorari to the Seventh Circuit Court of Appeals to review the judgment entered August 29, 1984.

OPINIONS BELOW

The Seventh Circuit Court of Appeals issued its judgment and opinion on August 29, 1984. They are reproduced as Appendix A. The opinion reversed the judgment on Counts I and II in Petitioner's favor entered by the District Court on February 8, 1984. The final judgment order entered pursuant to Fed. R. Civ. P. 54(b) is reproduced as Appendix B. The District Court's judgment was supported by an oral opinion issued on December 28, 1983, a Memorandum Opinion issued on February 8, 1984, and written Supplemental Findings issued on March 6, 1984. These are reproduced as Appendices C, D, and E, respectively.

The Court of Appeals denied a Petition for Rehearing on November 16, 1984. That order is reproduced as Appendix F.

JURISDICTION

The Court of Appeals' judgment in Respondent's favor on Counts I and II was entered on August 29, 1984, and its order denying the Petition for Rehearing was entered on November 16, 1984. The jurisdiction of this Court is invoked under the authority of 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. §2000e-2.

> (a) It shall be an unlawful employment practice for an employer
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;. . .

STATEMENT OF THE CASE

A. Summary

This is a Title VII case brought by a pilot who was fired by Eastern Air Lines, Inc. ("Eastern") because of her sex. After flying successfully and without incident for Eastern for 12 years, Karen Ulane took a medical leave of absence to have sex reassignment surgery which changed her sex from male to female. After an unusually rigorous series of physical, psychological and psychiatric examinations by the Federal Aviation Administration ("FAA"), Ms. Ulane received an FAA First Class Medical Certificate in February 1981. Ms. Ulane presented her FAA certificate to Eastern, offered to take any required examinations and retraining, and informed Eastern that she was ready to return to flight duty. On April 24, 1981, without ever examining her, Eastern fired her.

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In June 1981, Ms. Ulane filed with the Equal Employment Opportunity Commission ("EEOC") a charge of discrimination based on both sex and transsexuality. She received a right-to-sue letter dated June 17, 1981, and on August 4, 1981, she filed her complaint in the federal district court. Jurisdiction was based on 28 U.S.C. §1331. Counts I and II charge sex-based discrimination under Title VII. Count I charges discrimination as a female, and Count II charges discrimination as a transsexual.

Eastern moved for dismissal claiming that transsexuals were not protected by Title VII and that Ms. Ulane could not be discriminated against as a woman. The District Court denied the motion in an oral opinion on April 21, 1982 which held that Counts I and II stated claims of discrimination based on gender under Title VII. Cross-motions for summary judgment were later denied in a written opinion dated April 26, 1983.

Trial began on September 26, 1983 and was completed on December 27, 1983. On December 28, 1983, the District Court delivered its oral opinion finding that each of Eastern's reasons for the discharge was pretextual and that they established disparate treatment between Petitioner and Eastern's male pilots.

While expressing its firm opinion that Ms. Ulane had prevailed on Count II (discrimination as a transsexual), the District Court also stated the following regarding Count I:

> In doing so, I do not mean to imply that if Count I [discrimination as a female] were the only count I would not enter judgment for plaintiff on that count. I say that because one never knows beyond a shadow of a doubt what the Appellate Courts might do, and in the event the finding on Count II should be reversed, I would want plaintiff to be in the position of arguing alternatively that the judgment should be affirmed on Count I because upon remand in such a situation, I would enter judgment for plaintiff on Count I on the

basis of the record that has already been made here [C-34].[1]

On February 8, 1984, the District Court entered judgment in Ms. Ulane's favor on both Counts I and II (B-3). In its Supplemental Findings dated March 6, 1984, the District Court clarified its intent that, even though the ruling on Count I was stated in the alternative, the findings announced on December 28, 1983, applied with equal force to both Count I and Count II (E-2). The District Court also clarified its earlier rulings and unequivocally stated that, based on the evidence, Ms. Ulane is a transsexual and a female (E-2).[2]

Eastern appealed the judgment in Ms. Ulane's favor on Counts I and II. On August 29, 1984, the Seventh Circuit issued its opinion and judgment reversing the District Court. The Court of Appeals reversed the judgment on Count I because it concluded that the District Court made no findings to support its determination that Eastern had discriminated against Ms. Ulane as a female. It reversed the judgment on Count II based on its conclusion that Title VII does not protect transsexuals from discrimination based on sex. The Court of Appeals' decision makes clear that there are no medical or safety issues in this case. The Court of Appeals let stand the District Court's findings that Eastern's safety and medical concerns were completely without basis and

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[1] The reference to a letter and number refer to an Appendix and page.

[2] On December 28, 1983, in discussing the unusual factual issue of the plaintiff's sex, the District Court noted:

> Prior to my participation in this case, I would have had no doubt that the question of sex was a very straight-forward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex [C-4].

pretextual. On November 16, 1984, Ms. Ulane's petition to the Court of Appeals for rehearing was denied.

B. The Petitioner's Professional Background

Karen F. Ulane has been flying airplanes since 1959 and has been a certified pilot since 1964. She served in the United States Army from 1964 to 1968, where she was an honor graduate of the Army flight school, and flew many combat missions in Vietnam. Although the aircraft she was piloting was hit by enemy fire at least eight times, she handled all of those emergency situations without difficulty. Ms. Ulane was decorated with the Air Medal of Honor and eight clusters, the Vietnam Service Medal, and the Army Commendation Medal for exceptionally meritorious service. She was honorably discharged in 1968 and began flying for Eastern that same year. Ms. Ulane worked successfully for Eastern for 12 years and rose from the rank of Second Officer to First Officer. She was appointed by Eastern to serve as a flight instructor, a distinction Eastern acknowledged is an honor.

Ms. Ulane was elected and re-elected by her fellow pilots to represent them in the pilots' union. In the 16 years she flew for the Army and for Eastern, she logged over 8,000 actual in-flight hours. In all this time she never had any problem handling emergency situations, never had an accident or incident, never failed any of the tests which Eastern requires regularly of its pilots, and was never disciplined in any way. She was commended for her exceptional performance, and fellow pilots at trial described her as a "very sharp individual, a very sharp pilot". The District Court found she was not only a better-than-average pilot, she was "better than good" (C-14).

C. Gender Dysphoria

Karen Ulane is a transsexual. Transsexualism, or "gender dysphoria," is a condition where one experiences discomfort or discontent about being the anatomic sex to which one was

born.[3] Until she was diagnosed conclusively as a transsexual in 1979, she lived as a male. Eastern was informed of the purpose of Ms. Ulane's leave of absence in October 1979, about one month after it began. Eastern took no action at that time. Her surgery was performed in April 1980.

Ms. Ulane's transsexuality never interfered in any way with her ability to fly an airplane. Even Captain Causey, who played a major role in terminating Ms.Ulane, admitted at trial that through the date she took leave to prepare for her surgery, she was a "thoroughly competent and capable pilot."

The purpose of Ms. Ulane's leave, which began on September 1, 1979, was to enable her to prepare for sex reassignment surgery. She was thoroughly evaluated by the members of the Gender Board of the University of Chicago. Before a candidate is approved for surgery by the Board, the candidate must be approved by the unanimous vote of all the Board's members, which include a psychiatrist, a gynecologist, a urologist, a plastic surgeon, an endocrinologist, a general surgeon, and the University's legal counsel.

The Gender Board unanimously approved Ms. Ulane for surgery. Ms. Ulane and her doctors testified that the results of the surgery were excellent. When the surgical result is good, even a gynecologist cannot tell the difference between the post-operative transsexual woman and a person who was born a woman. Although reproductive organs are not created by the operation and the post-surgical transsexual woman cannot bear children, the anatomical likeness is identical. Based on its observations of Ms. Ulane in the courtroom from September through December 1983, and based on her testimony on the witness stand where she testified over

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[3] Transsexuality is entirely different from homosexuality: "Homosexuals . . . are not persons who have sexual identity problems. They are content with the sex into which they were born. Transsexuals, on the other hand, are persons with a problem relating to their very sexual identity as a man or woman" (C-4).

two separate days, the District Court found that "[i]t would take an extremely practiced eye, it seems to me, to detect any difference between the plaintiff and the biological woman" (C-13). The District Court also found that the psychiatric testimony confirmed her as a woman (C-13). By June 1980, she was prepared to return to her job as a pilot for Eastern.

D. The FAA Certification Process

After contacting Eastern about her desire to return to work, Ms. Ulane began her recertification procedure with the FAA. Ms. Ulane had to pass a current medical exam to have her FAA medical certificate renewed.

The FAA's investigation of Ms. Ulane was extremely thorough. In addition to the standard physical exam, the FAA required Ms. Ulane to be examined by an independent psychologist and an independent psychiatrist. Both found Ms. Ulane fully qualified to fly.

In addition to the two outside consultants, five additional doctors from the FAA, all of whom are specialists in aviation medicine, participated in the decision to certify Ms. Ulane. On January 23, 1981, the FAA notified Ms. Ulane that she was qualified for a First Class Medical Certificate.

The FAA has received applications from at least 21 transsexual pilots. It has found 19 of them, including Ms. Ulane, qualified to fly and has issued them medical certificates. The remaining two applications have been denied.

E. Eastern's Discriminatory Treatment of Ms. Ulane

While Ms. Ulane's application was pending before the FAA, Eastern conducted the "investigation" which supposedly determined that Ms. Ulane was somehow unsafe to fly. The District Court's findings concerning Eastern's investigation can be summarized with the following conclusions by the Court:

> Eastern went out of its way not to learn whatever could be learned in plaintiff's favor on the question of safety [C-15].

* * * *

> Eastern from the outset here took the attitude that its mind was made up, and it did not want to be confused with the facts. It substituted for any kind of investigation worthy of the name a prejudiced, close-minded predetermination of the question of whether plaintiff was suitable to continue in the cockpit of one of their air liners [C-16].

Eastern never gave Ms. Ulane any of the examinations it routinely uses for insuring that its pilots are qualified to fly. The District Court found that Eastern failed to follow its own procedures in Ms. Ulane's case because:

> The defendant was not interested in investigating or in following its normal procedures because it was afraid of what the results would be. It pretty well knew that those results would not bolster its already-made decision to fire the plaintiff but, rather, would undermine the legitimacy of that decision [C-27].[4]

After hearing at least 19 days of testimony, including 17 live witnesses, 4 videotaped witnesses, and 6 additional witness depositions, and after reviewing 76 plaintiff Exhibits and 45 defense Exhibits, the District Court found that each of Eastern's nine reasons for termination, whether considered individually or collectively, was pretextual. The District Court found that the entire discharge process had been managed by Eastern's legal department "in an obvious effort to avoid liability under the sex discrimination law" (C-14).

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[4] At trial one of Eastern's chief witnesses, Captain Causey, testified that he has no doubt that Ms. Ulane could operate the plane properly and safely and he knows of no one at Eastern who disagrees.

The District Court further found that Reason Five in the first discharge letter was a virtual admission of discrimination based on sex (C-23). Reason Five states:

> To the extent the operation and the counseling you have undergone have been successful in changing your essential nature from male to female, it has changed you from the person Eastern has hired into a different person. Eastern would not have hired you had it known you contemplated or might in the future contemplate such an action.

F. Karen Ulane Is A Female

In entering judgment for Ms. Ulane on Count I, the District Court found that Ms. Ulane is a woman and was discriminated against based on her sex (E-2). It is uncontroverted that Ms. Ulane's legal status in her home state is female, for Illinois recognizes the new legal status after sex reassignment surgery has been performed. *See* Ill. Rev. Stat. ch. 111-½, § 73-17(d).

After hearing extensive medical as well as lay testimony concerning Ms. Ulane's gender, after examining volumes of medical materials, and after having observed her over several months in the courtroom as well as on the witness stand, the District Court found that Ms. Ulane is a female (E-2).[5]

The District Court concluded that though there is no settled medical definition of "sex"; it "is not a cut-and-dried matter of chromosomes" (C-4). Defining an individual's sex requires considerations of psychological identity, societal perception, self-perception and other factors (C-4-5). The District Court found that Karen Ulane appears to be a biological woman, conducts herself as a woman (C-13), and her post-operative legal status is that of female (C-7). "The evidence

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[5] A substantial body of medical literature which was introduced into evidence supports this same result.

clearly predominates in favor of the conclusion that plaintiff is a female, not a male" (E-1-2).

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari for two reasons. First, the Court of Appeals seriously abused its authority in reversing findings of fact of the District Court in violation of the decisions of this Court and of Rule 52(a) of the Federal Rules of Civil Procedure. Without giving any reasons and without applying the "clearly erroneous" test, the Court of Appeals reversed the District Court's findings on Count I that the Petitioner was a female and that she was discriminated against on that basis in violation of Title VII of the Civil Rights Act of 1964 (the "Act"). The Court of Appeals' unexplained and improper usurpation of the fact-finding role of the District Court is a bold departure from the accepted and usual course of federal judicial proceedings, and is in direct conflict with decisions of this Court.

Second, the Court of Appeals' conclusion that transsexuals are not protected under Title VII from discrimination based on their sexual identity or change of sex is an unduly narrow and unsupportable interpretation of the statute's broad prohibition against discrimination based on sex. Whether transsexuals as a group should be prohibited from invoking the protection of Title VII is an important question of federal law which has not been, but should be, settled by this Court.

I. THE COURT OF APPEALS SERIOUSLY ABUSED ITS AUTHORITY BY REVERSING FINDINGS OF FACT OF THE DISTRICT COURT WITHOUT APPLYING THE STANDARD OF REVIEW REQUIRED BY FED. R. CIV. P. 52(a) AND DECISIONS OF THIS COURT

The District Court entered judgment in favor of Ms. Ulane on Count I because it found that she was a woman and that

she was discriminated against on that basis. While the Court of Appeals recognized that these findings might entitle Ms. Ulane to protection under Title VII, it failed to reach that question because it refused to accept the findings of the District Court. In fact, the Court of Appeals preemptively reversed the District Court's findings of fact (1) without so much as a nod to the governing standard of review and (2) without the careful review of the record necessary to reject a finding as clearly erroneous. The Court of Appeals' reversal of the findings of fact on Count I is in direct conflict with this Court's decision in *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273 (1982), and seriously undermines the fact-finding role of the District Court.

The Court of Appeals' flagrant procedural error works an exceptional injustice here because it thwarted one individual's struggle for fair treatment against a giant corporation whose every excuse for firing her was a pretext and a sham. The District Court found that Eastern, intentionally and in bad faith, worked a terrible injustice on Karen Ulane. Eastern fired her after she altered her physical characteristics to be consistent with her true sexual identity, that of being a woman. Once a woman, they subjected her to a different standard of treatment, far harsher than any male pilot received at Eastern.

Not every injustice has a remedy under Title VII. The federal laws are such that persons *can* legally be discriminated against in employment for a wide variety of reasons ranging from the color of one's hair to one's sexual preference. These reasons, outside of Title VII's coverage, may work injustices on the individuals involved, but Congress—and the courts—have marked out only specific kinds of discrimination in employment which are undeniably covered by Title VII. It is beyond dispute, however, that discrimination against a person because she is a *woman* falls squarely within this bright-line category.

After three months of trial and a painstaking assessment of all the evidence, the District Court made a finding that

Eastern discriminated against Karen Ulane *because she is a woman.* That finding is crystal clear, unambiguous, and plainly supported by the record. Yet the Court of Appeals rejected that finding in a manner squarely in conflict with the governing rule of law. This Court has commanded that in Title VII cases, a finding of discrimination against a person in a protected category—here discrimination against a person because she is a woman—can only be rejected *if the finding, after careful examination of the record, is determined to be clearly erroneous. See Pullman-Standard, Div. of Pullman, Inc. v. Swint,* 456 U.S. 273 (1982).

The injustice done to Karen Ulane by Eastern by ignoring the law has been compounded by the Court of Appeals' failure to engage in the required process of carefully analyzing the findings of the District Court and their foundation in the record—a record that is replete with support for the District Court's factual findings that she was discriminated against *because she is a woman.*

Not every injustice has a remedy under Title VII. But the injustice done to Karen Ulane because she is a woman must be remedied by this Court. Not to do so, based on the record in this case, would flaunt the procedural protections required by this Court in appellate review, and would be contrary to the allocation of judicial power among the federal courts.

A. The Court Of Appeals Ignored The Standard Of Review Required By This Court In *Pullman-Standard*

The Court of Appeals makes precisely the same mistake committed by the Fifth Circuit in *Pullman-Standard, Div. of Pullman, Inc. v. Swint,* which was reversed by this Court in 1982. 456 U.S. 273. In *Pullman-Standard* the Fifth Circuit reversed findings of the district court and substituted its own findings because it concluded that the lower court was wrong in finding no discrimination. The Fifth Circuit made only passing reference to Rule 52(a), Fed. R. Civ. P. This Court granted certiorari to settle the issue whether courts of

appeals are bound by the clearly erroneous standard under Rule 52(a) in reviewing lower court determinations of "ultimate" facts such as motive or intent in Title VII cases. 456 U.S. at 276. *See also* 5A J. Moore & J. Lucas, *Moore's Federal Practice,* ¶ 52.05[3] (1982) (noting conflict prior to *Pullman-Standard* as to whether "ultimate" facts were reviewable by independent examination of the court of appeals).

Pullman-Standard ended the confusion. This Court ruled that the Fifth Circuit erred in reversing findings of "ultimate fact" without deference to those findings under the "clearly erroneous" test of Rule 52(a):

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. *It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.* It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

456 U.S. at 287 (emphasis added); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 857 (1982) (reversing the Second Circuit because it had improperly substituted its interpretation of the evidence for that of the trial court).

Count I does not present a "mixed question of law and fact" but a simple question of "ultimate" fact: Was Karen Ulane discriminated against by Eastern because she is female? The Court of Appeals' one-page discussion of Count I, discarding the District Court's findings without even mentioning Rule 52(a) or examining the record, suggests that the Court of Appeals believes that the District Court did not mean what it said. The District Court expressly found the facts that the Court of Appeals seems to think it omitted: "[S]he is a female," and "she was discharged by Eastern because of her sex" (E-1-2).

After three months of trial, in an oral opinion that was later supplemented by further written findings, the District Court stated its findings that, based on a wealth of evidence, sex was more than just chromosomes (C-7). Indeed, under Illinois law, Karen Ulane is legally recognized as a female. *See* Ill. Rev. Stat. ch. 111-½, § 73-17(d). Under principles of federalism, that fact alone should receive considerable deference. But the District Court did not end its inquiry with taking judicial notice of the statute and the fact that Karen Ulane is legally recognized by the State of Illinois as a female (C-7). It also found by the preponderance of the evidence that Karen Ulane is a female based on (1) her testimony and demeanor; (2) the credibility of many expert witnesses; (3) Eastern's own perception of Ms. Ulane as a woman as reflected in the testimony of Eastern pilots who knew and worked closely with her; and (4) Eastern's own admission in Reason Five of the first discharge letter that her operation had "changed her essential nature from male to female."

Having found from the evidence that Karen Ulane was a female, the District Court further found that she was discriminated against by Eastern as a female. The Court stated that all of the findings made with regard to Count II apply to the conclusion that the Ms. Ulane was discriminated against as a female:

> It was and is my intention that all of my findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female [E-2].

The Court of Appeals' statement that "It is clear from the evidence that if Eastern discriminated against Ulane, it was not because she is female . . ." (A-12) is a flagrant usurpation of the District Court's function to find the facts and is in direct conflict with the District Court's findings.

Regardless whether this Court agrees with the Court of Appeals that discrimination against transsexuals is not covered by Title VII, we are left with the District Court's unequivocal conclusion that Karen Ulane was treated differently *as a woman*. The Court of Appeals' decision rides roughshod over these findings without even suggesting that they are clearly erroneous or unsupported by the record. The Court of Appeals merely "*reverses*" the District Court's findings and substitutes its own finding that Karen Ulane was *not* discriminated against as a female.[6]

The trial covered both Count I—discrimination against Ms. Ulane as a woman, and Count II—discrimination against Ms. Ulane as a transsexual. Contrary to the Court of Appeals' statement that all of the findings centered around discrimination against transsexuals, there was ample evidence at trial—and findings by the District Court—on Count I as well as Count II. For example, the District Court found:

> I read [Reason Five] as a virtual admission of discrimination, and in my view *that discrimination is based on sex* within the meaning of the statute. Item five is also in my view inconsistent with Eastern's position that plaintiff has undergone no sex change [C-23].

The Court also expressly found that Eastern did not fire male pilots who concealed psychological conditions from the FAA, but fired Karen Ulane for this reason (C-29-30).

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[6] The Court of Appeals misapprehends the facts when it states that the District Court "originally found only that Eastern had discriminated against Ulane under Count II as a transsexual" (A-11). The Court of Appeals overlooks the District Court's alternative findings, which were rendered immediately after trial: "I do not mean to imply that if Count I were the only count I would not enter judgment for plaintiff on that count . . . . [On remand] *I would enter judgment for plaintiff on Count I on the basis of the record that has already been made here.*" (C-34) (December 28, 1983) (emphasis added).

Summarizing numerous findings of disparate treatment between male and female pilots, the District Court said:

> I further find that the plaintiff was in almost every instance subjected to discriminatory and disparate treatment for conduct which was in almost every instance, if not every instance, far less serious than that of male alcoholics whose conduct was excused by Eastern [C-32-33].

If the Court of Appeals had examined the record and applied the clearly erroneous standard it would have concluded that the District Court's findings of fact on Count I were firmly rooted in the evidence.

The Court of Appeals was simply not correct when it stated that "even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on that basis" (A-11). The Court of Appeals must have overlooked or ignored the District Court's initial and supplemental findings. The Court of Appeals' disregard of these findings, and its neglect of the clear support for these findings in the record, is a violation of *Pullman-Standard* and Rule 52.

The District Court found that Ms. Ulane made a prima facie case, and that Eastern failed to articulate any legitimate reason for discharge. Those findings cannot be set aside unless they are shown to be clearly erroneous. This standard of review is an exceptionally important safeguard of the rights of Title VII litigants because it entrusts the questions of fact to the tribunal best able to assess those issues: the only tribunal that weighs credibility of witnesses. When the Court of Appeals freely disregards the fact-finding role of the District Court, the Supreme Court must exercise its authority to restore the necessary allocation of power between the trial and appellate courts.

B. The Court of Appeals Should Have Remanded Count I To The District Court

The Court of Appeals reversed on Count I, citing insufficient findings for the conclusion that Ms. Ulane was discriminated against on the basis of sex.[7] Based on its own contrary findings, the Court of Appeals ordered that judgment be entered in favor of the defendant. Under *Pullman-Standard* this procedure was improper.

This Court has ruled:

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, *the usual rule is that there should be a remand for further proceedings* to permit the trial court to make the missing findings:
>
> > '[F]act-finding is the basic responsibility of district courts, rather than appellate courts, and . . . the court of appeals should not have resolved in the first instance this factual dispute which had not been considered by the district court.' [citation omitted]
> >
> > Likewise, where findings are infirm because of an erroneous view of the law, *a remand is the proper course* unless the record permits only one resolution of the factual issue.

456 U.S. at 291-92 (emphasis added). *See also* 5A J. Moore & J. Lucas, *Moore's Federal Practice*, § 52.06[2] (1982) (noting that the proper procedure in the event of insufficient findings is to remand for appropriate findings).

The Court of Appeals did *not* hold that under no set of facts could Ms. Ulane establish a Title VII violation. Indeed, the Court of Appeals acknowledged that Karen Ulane is not

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[7] Although the Court of Appeals characterized the issue whether Ms. Ulane was discriminated against based on her sex as a "conclusion," it is clear that this is a *factual* issue under *Pullman-Standard*, as discussed above.

deprived of Title VII protection simply because she is a transsexual as well as a woman. *See* A-11-12, affirming the dicta in *Holloway v. Arthur Andersen*, 566 F.2d 659, 664 (9th Cir. 1977) ("transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII"). However, after concluding that discrimination against Ms. Ulane as a female would be actionable, the Court of Appeals then reached the anomalous result, even though the District Court had specifically found she *was* discriminated against as a female, of saying she *was not*. The Court of Appeals apparently believes that the District Court had made insufficient findings to support the ultimate finding that Ms. Ulane had suffered discrimination because she is female. ("Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on that basis." (A-11)). As we have shown, this is wrong. But even if the findings were insufficient, unclear or totally absent, the appropriate course is remand, not reversal. *See, e.g., In re Neis*, 723 F.2d 584, 588 (7th Cir. 1983) (where district court makes inadequate findings, remand for additional proceedings); *Morales v. Haines*, 486 F.2d 880, 882 (7th Cir. 1973) (where district court fails to find on a material issue, vacate and remand for appropriate findings); *see also DeAnda v. St. Joseph's Hospital*, 671 F.2d 850, 855 (5th Cir. 1982) ("if factual findings are absent, the case must be remanded for such findings").

Petitioner submits that, based on the extensive factual record and the detailed findings of fact made by the District Court (which were incorporated by reference rather than being recited verbatim with regard to Count I), and taking all the inferences and viewing all the evidence most favorable to the party prevailing at trial, as the court must do, *Aunt Mid, Inc. v. Fjell-Oranje Lines*, 458 F.2d 712, 718 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972), the District Court's ruling on Count I should have been affirmed. However, if the Court of Appeals had any doubt or confusion on the subject of what factual findings supported the finding of

discrimination against Ms. Ulane as a woman, or if the Court of Appeals concluded that those findings were somehow confusing or incomplete, remand was the only appropriate course of action.

II. IN CONCLUDING THAT TRANSSEXUALS ARE NOT PROTECTED BY TITLE VII, THE COURT OF APPEALS HAS CREATED AN EXCEPTION TO TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION WHICH CONFLICTS WITH THE BROAD LANGUAGE AND PURPOSE OF THE ACT

In excluding transsexuals from the protection of TitleVII, the Court of Appeals has decided that a group of individuals may be discriminated against based on their sex without redress to the nation's employment discrimination laws. Whether transsexuals should continue to be outside the scope of Title VII's protection is an important federal question which has not been, but should be, settled by this Court.

The Court of Appeals' conclusion that transsexuals should not be protected because Congress has not shown any specific intent to do so is inconsistent with the Act's general language and broad purpose. Granting protection for Ms. Ulane and other transsexuals discriminated against based on their sex, provides relief to the very individuals Congress sought to protect: victims of discrimination that is based on one of the impermissible factors—sex—and which is completely unrelated to the individual's capabilities and past job performance.

There is little doubt that the original goal of Congress in enacting Title VII was to protect blacks. Congress sought "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971); *see also* Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109,

1166 (1971). The legislative history to procedural amendments to the Act in 1972 also reveals that if Congress had any intention when it approved the addition of "sex" to the Act in 1964, it was to protect women. *See* H.R. Rep. No. 238, 92nd Cong., 1st Sess. 4-5 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2140-2141.

The language of Section 703(a) of Title VII, however, does not limit its protection to members of minority groups and women, and courts have refused to so limit it. *See McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976) (Title VII prohibits discrimination against whites as well as blacks); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (Title VII protects men as well as women). Rather than limit the Act to those groups that were undoubtedly the motivating force behind Title VII in 1964, courts have been guided in their interpretation by the larger purpose and principle that underlies it:

> [T]he removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Lower courts have stated the guiding principle of Title VII in a similar fashion:

> [T]he purpose of the Act was to provide a foundation in the law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Diaz v. Pan American World Airways, Inc., 442 F.2d at 386-87 (rule allowing only female flight attendants violates Title VII). Other courts have recognized that Title VII "requires an interpretation animated by the broad humanitarian and

remedial purposes underlying the federal proscription of employment discrimination." *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977) (sexual harrassment violates Title VII). The House Report to the 1972 amendments states the goal as follows:

> The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities.

H.R. Rep. No. 238, 92nd Cong., 1st Sess. 4-5 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2140-2141. These pronouncements establish that the language and remedial purpose of Title VII are broad enough to protect any individual who is the victim of discrimination based on any of the impermissible factors—race, color, sex, religion or national origin.

The Court of Appeals placed undue reliance on the lack of any legislative history indicating that Congress specifically intended to include transsexuals within the protection of Title VII. Courts have refused to follow such a rigid rule when construing the provisions of Title VII. For example, there is no legislative history which indicates that in 1964 Congress specifically intended to prohibit discrimination against men, single women who become pregnant, women who marry, women with pre-school age children, or the subclass of black females. Yet, in each of these instances the courts have drawn on the statute's general language, remedial purpose, and principle of non-discrimination to extend Title VII to the discriminatory policy. *See Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 371 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Jeffries v. Harris County Community Action Assoc.*, 615 F.2d 1025 (5th Cir. 1980).

The sexual harrassment cases also provide a prime example of how courts have refused to give sex the narrow and traditional interpretation adopted by the Court of Appeals.[8] These decisions firmly establish

> that sex discrimination within the meaning of Title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination.

Bundy v. Jackson, 641 F.2d 934, 942. The analysis in *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977), aptly applies to transsexuals:

> The statute in explicit terms proscribes discrimination "because of . . . sex," with only narrowly defined exceptions completely foreign to the situation emerging here. The legislative history similarly discloses *a congressional purpose to outlaw any and all sex-based discrimination,* equally with any other form of discrimination which Title VII condemns. [emphasis added]

In reaching its conclusion, the D.C. Circuit was guided by the overall purpose of the Act and refused "to speculate as to whether Congress envisioned the particular type of activity" as prohibited by Title VII. *Id.*

The sexual harrassment and "sex plus" cases reveal why a broad and liberal approach to interpreting Title VII is required:

> [Title VII] evinces a congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities. Rather, it pursued the path of

[8] *See, e.g., Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

> wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir.), *cert. denied*, 406 U.S. 957 (1972).

Faced with congressional silence on the meaning of "sex" for purposes of Title VII, the District Court correctly gave the term a liberal and scientific interpretation which is true to the broad purpose of Title VII (C-6-8). Based on the extensive medical record before it, its observations of Ms. Ulane in the courtroom and on the witness stand, and taking guidance from the social policy of the State of Illinois, the District Court found:

> that sex is not a cut-and-dried matter of chromosomes, and while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, "sex," as used in any specific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII. [C-7-8]

The District Court concluded that "sex" should not be limited to "*chromosomal* sex", absent some indication from Congress that it did not intend to prohibit all forms of sex discrimination. The language of Title VII is broad enough to protect an individual who has been discriminated against because she changed her sex from male to female.

The Court of Appeals' restrictive interpretation is based, in part, on its conclusion that Congress' refusal to extend Title VII protection to homosexuals "indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals" (A-9). The Court of Appeals has erroneously lumped together discrimination against transsexuals with discrimination

against homosexuals. Transsexuals are people whose anatomic sex at birth is different from their psychological sex. The purpose of surgery is to align the two. Karen Ulane was discriminated against because she did just this, she changed her gender from male to female. Eastern valued this employee as a man. It rejected her as a woman. Nothing changed but her gender. Discrimination against homosexuals, on the other hand, is based on an individual's sexual practices, something wholly unrelated to gender.

Title VII's general prohibition against sex-based discrimination protects an individual fired for reasons having nothing to do with merit and everything to do with gender. A condition of Ms. Ulane's continued employment as a pilot for Eastern was that she remain a man. This is sex discrimination.

CONCLUSION

The Court should grant the petition for certiorari in order to protect the integrity of the fact-finding role of the District Court and to ensure that all citizens enjoy the protection of Title VII's prohibition against sex discrimination.

Respectfully submitted,

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February 14, 1985

APPENDIX A

Opinion by Judge Wood
JUDGMENT—ORAL ARGUMENT

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1984.

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

KAREN FRANCES ULANE,
Plaintiff-Appellee,

No. 84-1431

v.

EASTERN AIRLINES, INC., A Delaware Corporation,
Defendant-Appellant.

Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.

No. 81 C 4411

Judge John F. Grady

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1431

KAREN FRANCES ULANE,

Plaintiff-Appellee,

v.

EASTERN AIR LINES, INC., a Delaware corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 4411—**John F. Grady**, *Judge.*

ARGUED JUNE 5, 1984—DECIDED AUGUST 29, 1984

Before CUMMINGS, *Chief Judge*, WOOD, *Circuit Judge*, and DUMBAULD, *Senior District Judge.**

WOOD, *Circuit Judge*. Plaintiff, as Kenneth Ulane, was hired in 1968 as a pilot for defendant, Eastern Air Lines, Inc., but was fired as Karen Frances Ulane in 1981. Ulane filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, which subsequently issued a right to sue letter. This suit followed. Counts I and II allege that Ulane's discharge violated Title VII

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* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (1982): Count I alleges that Ulane was discriminated against as a female; Count II alleges that Ulane was discriminated against as a transsexual. The judge ruled in favor of Ulane on both counts after a bench trial.[1] The court awarded her[2] reinstatement as a flying officer with full seniority and back pay, and attorneys' fees. This certified appeal followed pursuant to Federal Rule of Civil Procedure 54(b).

FACTUAL BACKGROUND

Counsel for Ulane opens their brief by explaining: "This is a Title VII case brought by a pilot who was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female." That explanation may give some cause to pause, but this briefly is the story.

Ulane became a licensed pilot in 1964, serving in the United States Army from that time until 1968 with a record of combat missions in Vietnam for which Ulane received the Air Medal with eight clusters. Upon discharge in 1968, Ulane began flying for Eastern. With Eastern, Ulane progressed from Second to First Officer, and also served as a flight instructor, logging over 8,000 flight hours.

Ulane was diagnosed a transsexual[3] in 1979. She explains that although embodied as a male, from early

[1] Counts III through IX, which allege violations of 42 U.S.C. §§ 1985(3), 1986, 18 U.S.C. § 371 (conspiracy), and 45 U.S.C. § 184 (Railway Labor Act), defamation, and intentional or reckless causing of emotional and mental distress, have not yet been tried.

[2] Since Ulane considers herself to be female, and appears in public as female, we will use feminine pronouns in referring to her.

[3] Transsexualism is a condition that exists when a physiologically normal person (*i.e.*, not a hermaphrodite—a person whose sex is not clearly defined due to a congenital condition) experiences

(Footnote continued on following page)

childhood she felt like a female. Ulane first sought psychiatric and medical assistance in 1968 while in the military. Later, Ulane began taking female hormones as part of her treatment, and eventually developed breasts from the hormones. In 1980, she underwent "sex reassignment surgery."[4] After the surgery, Illinois issued a revised

[3] *continued*
discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex. This discomfort is generally accompanied by a desire to utilize hormonal, surgical, and civil procedures to allow the individual to live in his or her preferred sex role. The diagnosis is appropriate only if the discomfort has been continuous for at least two years, and is not due to another mental disorder, such as schizophrenia. *See* Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 26, 1983, 10:00 a.m., at 35-37; *see generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.5x (3d ed. 1980); Edgerton, Langman, Schmidt & Sheppe, *Psychological Considerations of Gender Reassignment Surgery*, 9 Clinics in Plastic Surgery 355, 357 (1982); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn. L. Rev. 288, 288 n.1 (1975); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 963 n.1 (1971).

To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, *i.e.*, dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born. *See Diagnostic and Statistical Manual of Mental Disorders* § 302.30; Wise & Meyer, *Transvestism: Previous Findings and New Areas for Inquiry*, 6 J. of Sex & Marital Therapy 116, 116-20 (1980); Comment, 7 Conn. L. Rev., *supra*, at 292; Comment, 56 Cornell L. Rev., *supra*, at 963 n.3.

[4] Sex reassignment surgery for male-to-female transsexuals "involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics," such as breast development. Comment, 56 Cornell L. Rev., *supra* note 3, at 970 n.37 (citations omitted); *see also* Jones, *Operative Treatment of the Male Transsexual*, in Transsexualism and Sex Reassignment 313, 314-16

(Footnote continued on following page)

birth certificate indicating Ulane was female, and the FAA certified her for flight status as a female. Ulane's own physician explained, however, that the operation would not create a biological female in the sense that Ulane would "have a uterus and ovaries and be able to bear babies." Ulane's chromosomes,[5] all concede, are unaffected by the hormones and surgery. Ulane, however, claims that the lack of change in her chromosomes is irrelevant.[6] Eastern was not aware of Ulane's transsexuality, her hormone treatments, or her psychiatric counseling until she attempted to return to work after her reassignment surgery. Eastern knew Ulane only as one of its male pilots.

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[4] *continued*
(R. Green & J. Money eds. 1969); Stoller, *Near Miss: "Sex Change" Treatment and Its Evaluation*, in Eating, Sleeping, and Sexuality 258, 259 (M. Zales ed. 1982); Shaw, *Sex-change Capital: Surgeon is Town's Top Draw*, Chicago Tribune, Aug. 14, 1984, § 5, at 1, 3, col. 3.

[5] The normal individual has 46 chromosomes, two of which designate sex. An XX configuration denotes female; XY denotes male. These chromosome patterns cannot be surgically altered. Wise, *Transsexualism: A Clinical Approach to Gender Dysphoria*, 1983 Medic. Trial Tech. Q. 167, 170.

[6] Biologically, sex is defined by chromosomes, internal and external genitalia, hormones, and gonads. Wise, *supra* note 5, at 169. Chromosomal sex cannot be changed, and a uterus and ovaries cannot be constructed. This leads some in the medical profession to conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual's innate sex. *See, e.g.*, Wise, *supra* note 5, at 170; Stoller, *supra* note 4, at 273; Comment, Cornell L. Rev., *supra* note 3, at 970 n.37. Others disagree, arguing that one must look beyond chromosomes when determining an individual's sex and consider factors such as psychological sex or assumed sex role. Comment, 7 Conn. L. Rev., *supra* note 3, at 290-91 & n.6, 292 (psychological sex may be most important factor); Comment, Cornell L. Rev., *supra* note 3, at 965. These individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely "facsimiles." *E.g.*, Testimony of Dr. Richard Green, expert witness for plaintiff, trial transcript for Sept. 27, 1983, 10:35 a.m., at 226 & 252.

LEGAL ISSUES

A. *Title VII and Ulane as a Transsexual.*

The district judge first found under Count II that Eastern discharged Ulane because she was a transsexual, and that Title VII prohibits discrimination on this basis.[7] While we do not condone discrimination in any form,[8] we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction.

Section 2000e-2(a)(1) provides in part that:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to . . . discharge any individual . . . because of such individual's . . . sex . . . .

Other courts have held that the term "sex" as used in the statute is not synonymous with "sexual preference." *See, e.g., Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978). The

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[7] Not all of the experts who testified agreed that Ulane is a transsexual. (Although doctors attempt to perform sex reassignment surgery only on transsexuals—as opposed, for example, on transvestites or schizophrenics, that an individual has undergone such surgery is not determinative of whether he or she is a true transsexual. *See supra* note 3 and sources cited therein.) If Ulane is not a transsexual, then she is a transvestite. Even in the trial judge's view, transvestites are not covered by Title VII.

[8] Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a transsexual or as a female, but we need not reach that issue.

district court recognized this, and agreed that homosexuals and transvestites do not enjoy Title VII protection, but distinguished transsexuals as persons who, unlike homosexuals and transvestites, have sexual *identity* problems; the judge agreed that the term "sex" does not comprehend "sexual preference," but held that it does comprehend "sexual identity." The district judge based this holding on his finding that "sex is not a cut-and-dried matter of chromosomes," but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.[9] The district judge further supported his broad view of Title VII's coverage by recognizing Title VII as a remedial statute to be liberally construed. He concluded that it is reasonable to hold that the statutory word "sex" literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites.[10] We must disagree.

Even though Title VII is a remedial statute, and even though some may define "sex" in such a way as to mean an individual's "sexual identity," our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex. *See United States Department of Labor v. Forsyth Energy, Inc.*, 666 F.2d 1104, 1107 (7th Cir. 1981). The district judge did recognize that Congress manifested an intention to exclude homosexuals from Title VII coverage. Nonetheless, the judge defended his conclusion that Ulane's broad interpretation of the term "sex" was reasonable and could therefore be applied to the statute by noting that transsexuals are different than homosexuals, and that Congress never considered whether it should include or exclude transsexuals. While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.

[9] The judge did recognize that there may be some argument in the medical community about the definition of sex that he adopted. *See, e.g., supra* notes 5 & 6.

[10] Judge Grady explained:

> I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."

It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (citations omitted); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971). This sex amendment was the gambit of a congressman seeking to scut-

tle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. *See Bradford v. Peoples Natural Gas Co.*, 60 F.R.D. 432, 434-35 & n.1 (W.D. Pa. 1973).

The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation.

Members of Congress have, moreover, on a number of occasions, attempted to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation."[11] Each of these attempts has failed. While the proposed amendments were directed toward homosexuals, *see, e.g., Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 1-2 (1982) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., author of bill); *Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on*

[11] *E.g., 94th Congress*: H.R. 166, 94th Cong., 1st Sess. (1975); H.R. 2667, 94th Cong., 1st Sess. (1975); H.R. 5452, 94th Cong., 1st Sess. (1975); *95th Congress*: H.R. 451, 95th Cong., 1st Sess. (1977); H.R. 775, 95th Cong., 1st Sess. (1977); H.R. 2998, 95th Cong., 1st Sess. (1977); H.R. 4794, 95th Cong., 1st Sess. (1977); H.R. 5239, 95th Cong., 1st Sess. (1977); H.R. 8268, 95th Cong., 1st Sess. (1977); H.R. 8269, 95th Cong., 1st Sess. (1977); *96th Congress*: H.R. 2074, 96th Cong., 2d Sess. (1980); *97th Congress*: H.R. 1454, 97th Cong., 2d Sess. (1982).

Education and Labor, 96th Cong., 2d Sess. 6 (1980) (statements of Rep. Hawkins, chairman of subcommittee, and Rep. Weiss, N.Y., coauthor of bill), their rejection strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation, which would also exclude transsexuals. Furthermore, Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination. *Compare* H.R. 1454, 97th Cong., 2d Sess. (1982) (hearing held on Jan. 27, 1982) *with Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. Jan. 8, 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Grossman v. Board of Education*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); *see also United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981) (Congress is presumed to know the law and judicial interpretations of it); *United States v. Ambrose*, Nos. 83-1213 to 83-1221, 83-1291, slip op. at 15 (7th Cir. July 17, 1984) (Wood, J., concurring and dissenting) (same).

Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress. In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. *See Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972) (it is for

the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

Our view of the application of Title VII to this type of case is not an original one. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977), the only two circuit court cases we found that have specifically addressed the issue, both held that discrimination against transsexuals does not fall within the ambit of Title VII.[12] In *Sommers*, Budget Marketing fired an anatomical male who claimed to be female once Budget Marketing discovered that he had

[12] For examples of district courts that have refused transsexuals Title VII protection, see *Terry v. EEOC*, 25 Empl. Prac. Dec. (CCH) ¶ 31,638, at 19,732-33 (E.D. Wis. 1980); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Grossman v. Board of Education*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. 1975), *aff'd mem.*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978).

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misrepresented himself as female when he applied for the job. In *Holloway*, Arthur Andersen, an accounting firm, dismissed the plaintiff after he informed his superior that he was undergoing treatment in preparation for sex change surgery. We agree with the Eighth and Ninth Circuits that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.

B. *Title VII and Ulane as a Female.*

The trial judge originally found only that Eastern had discriminated against Ulane under Count II as a transsexual. The judge subsequently amended his findings to hold that Ulane is also female and has been discriminated against on this basis. Even if we accept the district judge's holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis. All the district judge said was that his previous "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female." This is insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around his conclusion that Eastern did not want "[a] *transsexual* in the cockpit" (emphasis added).

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. If Eastern had considered Ulane to be female and had discriminated against her because she was female (*i.e.*, Eastern treated females less favorably than males), then the argument might be made that Title VII applied, *cf.*

Holloway v. Arthur Andersen, 566 F.2d at 664 (although Title VII does not prohibit discrimination against transsexuals, "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII") (dicta), but that is not this case. It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual[13]—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.

Since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse the order of the trial court and remand for entry of judgment in favor of Eastern on Count I and dismissal of Count II.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[13] Because of our holding in section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality.

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APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAREN FRANCES ULANE, *Plaintiff,* v. **EASTERN AIRLINES, INC., et al.,** *Defendants.*	**NO. 81 C 4411**

FINAL JUDGMENT ORDER PURSUANT TO RULE 54(b)

For the reasons explained on December 28, 1983, in the court's oral findings of fact and conclusions of law, and the supplemental Memorandum Opinion entered this date, the court finds the issues in favor of the plaintiff and against the defendant Eastern Airlines on Counts I and II of the complaint. The plaintiff is hereby awarded the following relief:

MONETARY RELIEF

Salary	$166,476
Set Offs:	
Loss of license, benefits paid by Eastern during back-pay period	(16,277)
Plaintiff's earnings during back-pay period	(9,709)
BACK-PAY	$140,490
Interest at 8 per cent per annum	15,839
BACK-PAY PLUS INTEREST	$156,329
Reimbursement for out-of-pocket expenses; life and health insurance premiums; dental care; and airline tickets	2,261
TOTAL MONETARY AWARD THROUGH DECEMBER 31, 1983	$158,590

REINSTATEMENT

Plaintiff shall be reinstated as of the date of her discharge, with the following benefits:

Pension Contributions

Eastern shall make contributions in plaintiff's name to pension plans "A" and "B" according to the terms of the contract between the pilots and Eastern Airlines ("the contract"), based on the "salary of record" retroactive to April 24, 1981. Eastern is not required to reimburse plaintiff's pension plans for the amounts she has withdrawn from the plans since April 24, 1981, and will not incur any other liability as a result of plaintiff's withdrawals.

Sick Leave

Plaintiff's sick leave bank shall be credited with sick leave accrued at a rate of three days per month, retroactive to April 24, 1981, as provided in Section 38(A)(2) of the contract.

Vacation

Plaintiff's vacation bank shall be credited as provided in Section 16 of the contract.

Debentures

Plaintiff shall be awarded debentures and any other benefits which are part of any "give-back" programs in effect during the back-pay period.

Seniority

Plaintiff's seniority shall be reinstated and shall accrue to the position she would have had had she not been terminated, and as provided in the contract.

The court expressly directs that final judgment be entered in favor of the plaintiff and against the defendant Eastern Airlines as aforesaid. The court finds that this is a case in

which multiple claims are presented and in which multiple parties are involved; that the determination of the remaining claims will be greatly facilitated, and as a practical matter perhaps even obviated, by a decision on appeal from the foregoing final judgment on Counts I and II; and, accordingly, there is no just reason for delaying the entry of final judgment on Counts I and II or for delaying an appeal from that judgment.

DATED: FEB. 8, 1984

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAREN FRANCES ULANE, *Plaintiff,* v. **EASTERN AIRLINES, INC.,** a Delaware corporation, **FRANK BORMAN, THOMAS R. BUTTION, DAVID P. MILLETT** and **ROBERT SHIPNER,** *Defendants.*	Docket No. 81 C 4411 Chicago, Illinois December 28, 1983 10:25 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY, Judge.

TRANSCRIPT ORDERED BY: MR. DEAN DICKIE
MR. DAVID M. BROWN

APPEARANCES:
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MR. DAVID M. BROWN

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(The following proceedings were had in open Court:)

MR. DICKIE: Good morning, your Honor.

THE COURT: Good morning.

THE CLERK: 81 C 411, Ulane v. Eastern Airlines, case on trial.

THE COURT: I will give you my findings of fact and conclusions of law.

The threshold issue before the Court is whether Title VII of the Civil Rights Act of 1964 applies to transsexuals. The statutory language in Title 42, Section 2000e-2(a) provides that:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin."

So the specific question before the Court is whether the phrase, "because of the individual's sex," encompasses a person such as the plaintiff who alleges that she is a

transsexual or, alternatively, that having gone through sex reassignment surgery, she is now no longer a man but a woman.

The legislative history of the statute I have just quoted is hardly a gold mine of information. It is summarized in the case of *Holloway* v. *Arthur Andersen & Company*, 566 F. 2d 659 at page 662, a Ninth Circuit case, which I cited in denying the motion to dismiss. The Court there said:

> "There is a dearth of legislative history on Section 2000e-2(a)(1) which was enacted as Section 703(a)(1) of the Civil Rights Act of 1964. The major concern of Congress at the time the Act was promulgated was race discrimination. Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII and without prior hearing or debate."

Well, those who have looked a little further into the matter know that this amendment introducing sex into the picture was a gambit of a Southern senator who sought thereby to scuttle the whole Civil Rights Act, and, much to his amazement and no doubt undying disappointment, it did not work. We not only got an act including race discrimination, which he had sought to bar, but we got sex as well. The question we are confronting here today is: What did we get when we got sex?

I have previously held in denying defendants' motion to dismiss that I believed the complaint adequately alleged that the discharge was related to sex or had something to do with sex. I continue to hold that layman's reaction to the simple word and to the facts as alleged in the complaint. Most of the cases and perhaps all of the cases which have addressed this issue have held that the statute does not apply to transsexuals. I think, however, all of those cases were decided on motions to dismiss, and, in any event, I think none of them was decided on a factual record as complete as the one we have here.

Those who argue that the legislative history indicates a lack of intention on the part of Congress that the Act would apply to transsexuals cite the unsuccessful attempts to amend Title VII in later years to include protection for homosexuals and transvestites. I think that argument is invalid. There is in the record before us evidence which makes quite clear that there is a distinction between homosexuals and transvestites on the one hand and transsexuals on the other.

Homosexuals and transvestites are not persons who have sexual identity problems. They are content with the sex into which they were born. Transsexuals, on the other hand, are persons with a problem relating to their very sexual identity as a man or a woman. I believe on that basis the situation of a transsexual is distinguishable.

I have no problem with the idea that the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex.

I will also put it more tentatively and say that if there is such a settled definition, it was not adverted to by any of the experts who testified at this trial. Plaintiff's witness, Dr. Green, and other witnesses as well emphasized that sexual identity is in part a psychological question. That is to say, it is a question of one's own self-perception: How does one

perceive oneself in terms of maleness or femaleness? It is also a social matter: How does society perceive the individual?

Such a problem is not unprecedented in the law or in the specific context of laws prohibiting discrimination. I refer you to an interesting case decided by my colleague, Judge Getzendanner, *Carrillo* v. *Illinois Bell Telephone Company*, 538 F. Supp. 793. The question there was whether Title VII and 42 U.S.C. Section 1981 applied to Hispanics when those statutes used the word, "race." The Court there pointed out that many Hispanics are white in the same sense that non-Hispanics are white, and yet they perceive themselves to be of a different race, and they are perceived by some others as being of a different race.

Judge Getzendanner remarked at page 795:

> "On the issue whether discrimination against Hispanics constitutes discrimination based on race or on national origin, there is a substantial divergence of opinion. Some Courts have viewed such discrimination as based solely on national origin and have dismissed Hispanics' claims under Section 1981. The trend among the Judges of this district has been to consider discrimination against Hispanics as racial discrimination.
>
> "The Courts extending Section 1981 to discrimination against Hispanics have frequently relied on the following dicta from *Budinsky* v. *Corning Glass Works*, 425 F. Supp. 786, 788, Western District Pennsylvania, 1977. The terms, 'race' and 'racial discrimination,' are subject to a commonly accepted, albeit sometimes vague, understanding. Those Courts which have extended the coverage of Section 1981 have done so on a realistic basis within the framework of this common meaning and understanding. On this admittedly unscientific basis, Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and however inaccurately or stupidly, are frequently and even

commonly subjected to a racial identification as non-whites. There is accordingly both a practical need and a logical reason to extend Section 1981's proscription against exclusively racial employment discrimination to those groups of potential discriminatees.

"As Judge Moran explained the issue in *Aponte, supra*, 'The plain meaning of the statute, Section 1981, attempts to remedy different treatment of whites and non-whites. Because Hispanics are frequently identified as non-whites, this Court believes that the scope of Section 1981 is broad enough to extend to that group.'"

Judge Getzendanner concludes that it is necessary to consider each case on its own merits and determine whether the particular Hispanic plaintiff was subjected to race discrimination, which would not necessarily be determined by the actual color of his or her skin.

Now, that case is not, of course, precisely applicable here, but it is illustrative of the fact that the things we know we do not necessarily know and that people sometimes react to other people according to stereotypes, misperceptions, and other motivations which are arguably discriminatory and are arguably redressable under statutes which might not be thought ordinarily to apply to those situations.

Title VII is a remedial statute which is to be liberally construed. That fact, I think, is well accepted and not irrelevant to the inquiry before us. The only defense witness I can recall who argued with or contradicted the proposition that sex is at least in part a question of self-perception and a societal perception was Dr. Wise. He stated flatly that sex is chromosomal. That creates a dispute in the evidence, but it is a dispute which I resolve against the defendant because I do not feel comfortable relying upon the testimony of Dr. Wise. He was a remarkable witness. He stated that the plaintiff is beyond a shadow of a doubt a transvestite. This is a man of science who had never seen the plaintiff, who knew very little about her, who had not even read all of the records

pertaining to her, who had read very few of the recent records which seemed to me to be very important, who had read some of the literature in the field but stated that he disagreed with other literature even though he had not read it, and who stated that he knows beyond a shadow of a doubt—those are his exact words—that this plaintiff is a transvestite and not a transsexual.

I have been listening to witnesses for many years, and I have never heard an expert witness state that he was sure of anything beyond a shadow of a doubt. That was typical of Dr. Wise's testimony. That is the most egregious example that I can think of from his testimony, but it is by no means atypical of the tenor of his testimony.

I can tell you quite candidly that I attach no weight whatever to his testimony and, other things being equal, would be inclined to believe that the opposite of anything he testified to would be more probably true than not true. I am not using that method, however, to arrive at my factual conclusions in this case because there is an abundance of other evidence for me to refer to.

On the question of the reaction of society to transsexuals, I believe the Illinois statute is pertinent. Plaintiff has under the laws of the State of Illinois been issued a new birth certificate with a sex designation of female. This is a statute that was enacted by the people of the State of Illinois. This to me is pretty strong evidence of a social policy in this area.

While I do not agree with plaintiff's argument that that statute makes the plaintiff a female or that the statute has some sort of binding effect in a federal civil rights action, I do think that the enactment of the statute is a circumstance which is pertinent to the question of plaintiff's sexual identity and the larger question of whether sex is a cut-and-dried matter of chromosomes.

I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical

community, the evidence in this record satisfies me that the term, "sex," as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.

I will say now as I said at the time I denied the motion to dismiss that, if I can borrow a phrase, there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, "sex," would include transsexuals. The matter simply was not thought of. It was not discussed. Nothing was discussed that we have any record of that would have any relevance to the question before us. But I believe that working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way. I believe that the term, "sex," literally applies to transsexuals and that it applies scientifically to transsexuals. That there is room for argument on the question does not release me from making a decision one way or the other, and I have made the decision which seems to me to be the one most consistent with the factual record that was developed in this case.

I turn now to the second question, and that is whether the plaintiff is a transsexual. The defendant argues that she is not a transsexual, that instead she is a transvestite. If that is true, she is not protected by the statute.

There are a number of things which persuade me that the plaintiff is a transsexual. She was found to be such by the unanimous decision of the Gender Identity Board of the University of Chicago Medical School. It would be difficult, I think, to imagine a more prestigious auspices under which to make a finding of any kind. I am disinclined to overrule that finding on the basis of the testimony I have heard from defendants' witnesses.

I found Dr. Berger a very credible witness. Although he was called as a witness by the defense, his testimony was, of course, favorable to the plaintiff. He was her doctor. He was

perhaps primarily in charge of her case. There is no doubt whatever in Dr. Berger's mind that plaintiff was and is a transsexual. I believe that he is eminently qualified to make that determination. Plaintiff meets the criteria of the DSM III, the recognized definitional standard for judging transsexuality.

The defendant argues with these determinations and says that what has happened here is that plaintiff managed to persuade these eminent medical practitioners by means of retrospective distortion. In short, as Dr. Arbitt said in his deposition, the plaintiff conned her way into the operation. I understand that it is the defendants' position in this trial that some of that distortion may even have been inadvertent and unconscious, but, nonetheless, it is the defendants' position that in large part the plaintiff through a facile manipulation of these medical persons managed to get for herself this operation in 1980 that she had been denied in 1970.

Dr. Berger said something that struck me as important. He was asked whether he relied upon what plaintiff said, and his response was, "I did not rely only on what she said." If anything is true in this case, that is true.

This takes us to an analysis of the person we are dealing with. At the time of this irreversible decision, the plaintiff was 38 years old. She had had two marriages. She had experienced the pleasure and the happiness to the extent she was able to do so of marriage and fatherhood and certainly was well aware of what she would be foresaking irretrievably if she subjected herself to this surgery. She had more than the ordinary understanding that a patient would have prior to undergoing surgery. Most of us put outselves in the hands of doctors and hope for the best. This was not true in the case of plaintiff. She knew more about this subject matter from a scientific point of view than many psychiatrists, if not most psychiatrists, and certainly more than most physicians.

Now, the defendant says this is an arrow in its quiver. Because she knew so much, she was able to dissemble. That is one interpretation of the evidence, and it is one possibility. But the inference I draw from plaintiff's sophistication in the question of transsexuality and sex reassignment surgery is that she had a complete, or as complete as can be, understanding of the pitfalls of an unsuccessful adjustment to the life of a female after transsexual surgery. She had undoubtedly read of those examples, which, in fact, are quite few, of sex reassignment patients who had decided later that they made a mistake, and some of them came to a bad end.

The plaintiff is in the upper range of intelligence. She certainly was capable of understanding all of the implications of what it was she was doing. Those implications did not merely extend to her physical well-being, her psychological well-being, the question of whether she was going to be miserable or relatively happy for the remaining 40 or so years of her life, but they extended to the very subject matter of this lawsuit. The plaintiff undoubtedly knew that she was asking for trouble in terms of her continued employment if she were to have this surgery. That, of course, is why she did not volunteer this information all these years. She anticipated the very reaction that did indeed eventuate. She is accused of having poor judgment in failing to make these disclosures. I will get to that in a while. One cannot accuse her of being incapable of making fairly accurate predictions about what was going to happen. She lost her job, and before she had this surgery, she knew that that was a very good possibility. She went ahead and had the surgery anyway knowing that by doing that she would jeopardize something she truly does love, her job flying an airplane.

Now, I do not know what it would take to convince defendant that a person who undergoes so radical a procedure as the one that was involved here, knowing all of the dangers and all of the trouble that it would and might involve, did not do it for some ulterior purpose. Defendant suggests that plaintiff did not really believe she was a

transsexual. She believed she was a transvestite and, therefore, was virtually certain to have an unsuccessful, if not disastrous, post-operative course; she anticipated that she would lose her job and have to fight in Court to get it back, with a very uncertain result, and yet for some reason she saw fit to pull the wool over the doctors' eyes and have this operation. That just is not a reasonable proposition, and yet that is what the defense is in this case in large part.

Harking back to what Dr. Berger said, he said, "No, I do not rely on just what she says." What he meant was he relied on what she did, and I, too, rely on what she did in order to make my determination as to whether she was a true transsexual, which, after all, is largely a matter of her own attitude, her own belief about herself, or whether, on the other hand, she was not a transsexual but an aging and dissembling transvestite. I find that she was and is a transsexual.

The fact that she took a long time to make up her mind and that there were many changes of mind and reversals and uncertainties in the process is not, as defendant would have me believe, evidence of the plaintiff's insincerity and evidence of the mistake that plaintiff made in ultimately having the surgery; rather, it is to me a scenario of what typically happens in any scientific endeavor. It is a matter of trial and error, and it is a matter of checking and rechecking. It is a matter of going back to the drawing board.

There was nothing about plaintiff's history that causes me to feel that I am in a position to second-guess the University of Chicago Gender Identity Board on the question of whether plaintiff was a transsexual and should have had this operation.

Dr. Berger originally thought plaintiff was not a transsexual but eventually changed his mind. That did not to him indicate that there was any reason not to have the operation and not to classify plaintiff as a transsexual, and there is not anything in the definition of a transsexual which precludes

the element of doubt; but those doubts were resolved before the surgery, and I might say that the fact that there were only seven months of the real life experience as opposed to a year or two years is to me absolutely immaterial. It was a matter of economic necessity that the plaintiff proceed with this matter and get back to work if that were possible. Waiting any longer would have simply been biding time for no purpose. All of her physicians were satisfied that she had spent a sufficient length of time to indicate that she could successfully live as a woman and that the surgery was proper.

It seems to me that one of the many unreasonable positions Eastern takes in this case is that plaintiff did not try to live as a woman in her job. She had been fired from her job just as soon as she had the surgery. Apparently Eastern would have me believe that if Ken Ulane had shown up for work in a dress and boarded the plane that there would have been no problem at Eastern. Now, if Eastern means, well, she should have done it in some other job, she did do it in whatever other job she could find. How much that proved I do not know because it was not the job that she hopes to regain. Where she could have found a job as an airline pilot cross-dressing as a woman and maintain that job for a period of a year is something which leaves me totally mystified.

Another consideration on whether plaintiff is a true transsexual is the post-operative course. It has not been a long time. It has been three years. To the extent that plaintiff has had an opportunity to demonstrate a successful post-operative course, she has done so. Her adjustment has been remarkably good. She testified without contradiction that she is a member of her community and is relating well to other people of both sexes, active in her church, in fact, vice president of her church having been elected to that position by co-parishioners who know of her situation. What more can she do? She is not flying an air liner, but Eastern will not let her fly an air liner, nor will anybody else in the present circumstance.

Eastern's medical witnesses would never be satisfied with the post-operative course. If we were in here 30 years from now and there had not been a single problem that could be demonstrated, they would still take the position that you cannot tell about tomorrow.

Another factor which I think is relevant is how plaintiff appears to other people. I have the psychiatric reports and the testimony of the various psychiatrists as to how plaintiff appears to them. She appears to them to be a woman. She conducts herself as a woman. She dresses as a woman. There is nothing flamboyant, nothing freakish, about the plaintiff. It would take an extremely practiced eye, it seems to me, to detect any difference between the plaintiff and the biological woman. My observation of her in this courtroom and on the witness stand leads me to concur with those witnesses who have said that she appears to be a biological woman. That, I think, has a bearing on the likelihood of her successful post-operative course.

It also has a bearing, if seems to me, on the question of whether she is a transsexual in the first place. There has been no reversion to any masculine behavior that we have any knowledge of. Eastern, of course, has studiously avoided making any examination of the plaintiff, or having her tested, having their own psychiatrist examine her as they do in the case of other employees with psychological problems. They prefer instead to say that the post-operative course is unknown and that the path is fraught with danger.

The third question is whether the plaintiff was discharged because of her transsexuality, which is another way of asking whether she was discharged because of her sex. The question, of course, is not whether sex was the sole cause of her discharge. The question is whether it was a motivating factor but for which she would not have been fired. There may have been other causes. I will deal with that as I go along. But assuming there were, if she would not have been fired but for her transsexuality, the statute has been violated.

There are two unusual aspects to this case. Well, I suppose there are many, but two that are immediately relevant to the present inquiry. The first is that the transsexual surgery is what triggered the firing. That is the very thing that is in issue in the case that is undeniably the initial occasion for the inquiry which led to the discharge. Plaintiff had been employed by Eastern as an airline pilot for 12 years and had performed successfully. As Captain Causey said, she was better than an average pilot, and if they are not good, they do not keep them. So in saying that she was better than average, that means she was better than good.

The first inkling of any discharge was when she had this surgery. So that differentiates this case from the usual Title VII case where the defendant says there were many things in the background of this employee which explain the discharge other than race or sex or whatever might be involved. Here there is not anything in the background other than the matters which first arose when plaintiff had the sex reassignment surgery.

The second unusual feature of this case is that the discharge was managed and coordinated by the defendant's legal department, which carefully drafted the two discharge letters in an obvious attempt to avoid liability under the sex discrimination law. You had here a filtering process that you do not ordinarily have when a disciplinary action is taken against an employee. There is usually a foreman without a lawyer at his elbow who does the dastardly deed, and then we argue about why he did it. Here the lawyers were in charge from day one and screened everything that happened, in fact, literally pulled the strings throughout the entire case.

I refer to the lawyers in Eastern's legal department. I have nothing but admiration for the conduct of Eastern's trial counsel in this case.

The defendant has attempted to articulate non-discriminatory reasons which, unless pretextual, would justify

the firing. What I want to do now is to take the two discharge letters and go over them item by item to see whether or not plaintiff has proved in each instance by the greater weight of the evidence that the particular reason was pretextual.

Turning to the first discharge letter dated April 24th, 1981, the first reason was that the continued employment of plaintiff as a pilot was inconsistent with the safety considerations which underlie the so-called coordinated crew concept of Eastern. The law requires, first of all, that the defendant articulate a reason for the discharge. I do not believe that the defendant has even articulated a rational reason for the discharge. Articulate means more than simply to recite by rote; it means to state in a comprehensible and rational way so that the meaning of the statement can be understood.

The question at issue here is the relationship of the plaintiff's transsexuality to any legitimate safety consideration. It is that relationship which first has to be articulated, and then we get to the question of whether the articulation is a pretext. In my view, we do not even get past the first hurdle in this case.

You will recall how I tried to have Dr. Millett and Captain Causey explain to me what Eastern means by this safety consideration in relation to the coordinated crew concept. Those questions were not in the script, and they were not very good at ad libbing. As I sit here now, I still do not know what any such actual relationship could be. We broke it down a little further into the question of trust. Trust about what? What did I get but more coordinated crew concept, underlying psychological problems, pat phrases which have been programmed into the defense in this case but which have no factual basis.

Eastern went out of its way not to learn whatever could be learned in plaintiff's favor on the question of safety. Its primary source of information was a psychiatrist who has had absolutely no experience with adult transsexuals and

who continues to this day to be largely ignorant of that area of psychiatry, and I refer to Dr. Kelly.

Dr. Millett, who knows nothing about the subject, talked to Dr. Kelly, who knows next to nothing about the subject, and got from Dr. Kelly the name of Dr. Meyer, who knows a lot about the subject, but who in a fairly short telephone conversation with Dr. Millett, if it took place, could not have told Dr. Millett that plaintiff constituted a danger in the cockpit of an airplane. There is not even any such contention. The only contention is that Dr. Meyer said that the surgery was still experimental and not a cure for the underlying psychological problem.

Eastern took it from there and conjured up all sorts of dangers that inhered in the so-called underlying psychological problems. It was not even a matter of their putting the burden of proof on the plaintiff. They never gave plaintiff any kind of a fair hearing, never gave her any opportunity to show that they were wrong, or that even if as a general proposition there might be some reason for concern that that concern did not apply to her particular situation.

Eastern from the outset here took the attitude that its mind was made up, and it did not want to be confused with the facts. It substituted for any kind of investigation worthy of the name a prejudiced, close-minded pre-determination of the question of whether plaintiff was suitable to continue in the cockpit of one of their air liners.

I am not going to go through the testimony of these witnesses. I merely invite anyone who is curious to read with attention the testimony of those witnesses who sought to explain or, I think more properly, who sought to avoid explaining because they could not explain the relationship between any legitimate safety concern and plaintiff's transsexualism, the plaintiff's surgery or anything else about the plaintiff's medical or psychological condition.

Everybody passed the buck. The legal department wrote the letter. They did not show up to testify, but Captain

Buttion said he relied on them to find out whether the drugs that plaintiff was taking were dangerous. He assumed, testified Captain Buttion, that the medical department had determined that the hormones plaintiff was taking were not approved by the FAA. He relied entirely on the medical department and on the legal department. The medical department in turn relied upon the information I have already described.

The safety concerns that Eastern purports to have been cognizant of appear to be readily dispelled when confronted with the facts. I give you a dramatic example: Captain Shipner. If ever there was a witness who entered this courtroom convinced that plaintiff did not belong in a cockpit, it was Captain Shipner, who did not make the decision, incidentally, and by saying he was convinced, I do not mean to say that Eastern was convinced. Eastern was not convinced at all, but a lot of things that Eastern did have served to convince some of its employees that there is something wrong with plaintiff that precludes her from flying. Captain Shipner testified that he was very concerned about these hormones that the plaintiff was taking, but then he said: "Well, if it turned out that those hormones had been prescribed by a physician, he would have no problem with it at all."

I think we could make a believer out of Captain Shipner if we had a little more time, but Eastern never took the time and was not interested in taking the time.

Captain Helms, another non-believer, testified that the reason he was concerned with the plaintiff's truthfulness and why he felt that her lack of truthfulness would be devastating as far as crew coordination was concerned was that she had been taking drugs which affected her ability to fly. He said, and I believe this is an exact quote:

> "If I knew someone was taking heroin, I would not let them in the cabin."

Now, here is one of the most distinguished captains of Eastern Airlines who apparently believed before he came into this courtroom that there was a legitimate comparison between someone who is taking heroin and someone who is taking the female hormones that the plaintiff was taking. He went on to say in further testimony that if he knew there were no side effects or adverse reactions, then it would not bother him that plaintiff had been taking hormones. He said that if all plaintiff is taking is Ovulen-21, that changes his answer altogether as far as his concern about truthfulness on the question of drugs is concerned.

What would have happened here if instead of taking the negative ostrich-like position that Eastern took it had taken a positive constructive attitude toward this problem and attempted to solve it intelligently by investigation and education rather than by denial and pretext? What would have happened?

I think that the testimony of Captain Lewandowski, who testified as the plaintiff's rebuttal witness, is very credible. I think it speaks extremely well for the character of such a man to have befriended plaintiff, taken her into his home, fully realizing the attitude of Eastern and fully realizing the attitude of some of the other pilots. That, as I say, reflects well on his character in my view, and I find him otherwise to be an extremely credible witness. He said that the present situation is that there is a small group of pilots who are dead set against the plaintiff, and there is a small group like himself who are very strongly in favor of her. He said that the vast majority of pilots are waiting to see what happens, and he believes that they believe in the system. If the system represented by the FAA says she is fit to fly, that would be good enough for them.

That strikes me as credible testimony, far more believable that the testimony of people like Captain Helms and Captain Shipner who predict dire consequences should plaintiff return to the cockpit, but whose testimony falls apart as soon as you start confronting them with the facts. I think those

witnesses, Captain Shipner and Captain Helms, do not take the attitude: Do not confuse me with the facts. They strike me as being willing to listen to the facts, and I have no doubt whatever that that attitude is characteristic of the vast majority of Eastern pilots who, after all, have to be highly intelligent and resourceful individuals, and I emphasize the word, "individuals," to hold the responsible jobs that they do. I think if they are given the facts and had they been given the facts initially, there would have been no problem here.

I conclude that reason number one, first of all, is not articulated in any sense that I understand that word, but even if we get over that and get to the question of whether it is a pretext. It is a sham of the first order.

Let's go to the second reason; that plaintiff's first class medical certificate is not unconditional. Even Dr. Millett agreed in this courtroom that plaintiff's certificate is substantially the same as the certificate issued to alcoholics. I so find. It seems to me substantially identical. Any differentiation that I heard amounts to a mere quibble.

It is interesting to trace the origin of the requirement that there be any follow-up at all on plaintiff's certificate. The origin was the anticipated unfavorable reaction of the Eastern crews which might in turn cause emotional problems for the plaintiff. Here we have Eastern doing its best to drum up the very kind of adverse crew reaction that motivated the limitation in the first place, using that limitation as a reason for disqualifying the plaintiff.

You will note that Dr. Haynes before recommending the follow-up says quite clearly that he knows of no reason at all that the plaintiff is not qualified to fly the airplane. His concern is not with any emotional problem the plaintiff might have if she is left alone but, rather, with some response that an unfriendly treatment at the hands of fellow crew members might cause.

Eastern has not changed its mind about the plaintiff even though she now has an unrestricted first class medical certificate. There is no retreat from this particular reason. Dr. Hutson testified from this stand the other day that the FAA is wrong. He does not pay any attention to that unrestricted first class medical certificate. The FAA does not know what it is doing. It is not following its own rules. Dr. Hutson is an example of one of the Eastern witnesses who, by his own admission on the witness stand, could never be convinced by any evidence whatsoever that plaintiff is fit to fly the airplane. I find that reason number two is a pretext.

Reason number three was that surgery does not solve the underlying psychological problem and that the surgery was unproven and experimental. We have an articulation problem again because there is a total failure to relate this concern to any question of cockpit safety. Let's assume the surgery does not work. Let's assume that it does not do anything about the underlying transsexuality which is the underlying psychological problem. How does it follow that plaintiff would be a less safe pilot than she had been for the preceding 12 years when as a transsexual she safely piloted Eastern airplanes?

Even Dr. Meyer, who has a jaundiced view of reassignment surgery, says that on the average the worst that can happen is that there is no improvement. It does not make them any better, it does not make them any worse. He tends to ignore the substantial body of medical literature which supports the proposition that sex reassignment surgery has on the whole been successful in alleviating the anxieties and the depressions that transsexuals without the surgery frequently have. Perhaps ignore is the wrong word. He simply disagrees with the conclusions of these other experts in the field.

Even Dr. Meyer, whose views are certainly in the minority, does not support the view that an unsuccessful surgery leaves the patient worse off than he or she was before the surgery.

It should be noted that the surgery is not designed to cure anything. The person after the surgery is still a transsexual. So it does not cure the transsexuality. It is hoped that the person will be more comfortable and lead a happier life, but the most energetic supporter of the surgery would have to concede that even where that happens, the person who had the surgery still has an underlying problem. He is walking around with a sexual situation that he or she was not born with.

Now, if that is what is meant by not solving the underlying problem, nobody can argue with that. What Eastern failed to articulate here is what underlying problem there is other than the mere fact of transsexuality. Try as I might, try as counsel for the plaintiff might, we could not worm it out of anybody. I sat and listened to Dr. Kelly for a couple of hours repeat the same rote response about underlying psychological problems, the nature of which he does not know but he is sure exist and he is sure constitute a safety hazard.

The other thing that I think is important about reason number three is that Eastern made no effort whatever to determine what the particular situation was in plaintiff's case. They simply did not have enough information to take the position that they did; namely, that you can categorize transsexuals across the board as persons who would represent a safety problem in a stressful situation. That generalization is no more true of transsexuals than it would be true of people who are left-handed or who are dyed-in-the-wool Republicans. It is no escape from that fact to say, "Well, we just do not know." Ignorance, prejudice, discrimination, and hatred have throughout history been justified by, "We do now know; we cannot take a chance." I think that one of the things that Title VII sought to accomplish was the elimination of that kind of attitude.

This might be a good point for me to comment generally on the medical witnesses in this case. I went through my notes last night very carefully, and I did in this case what I

usually do. I make my own notes of my impressions of the witnesses as we go along: Are they credible? Do they seem to me to be telling the truth? Are they reliable? My reaction to each and every plaintiff's medical witness was positive. My reaction to each and every defense medical witness was negative.

Now, I am considering in that connection Dr. Northrup and Dr. Berger to be plaintiff's witnesses even though they were called by the defendant. There was just a difference in the caliber of person. Dr. Meyer, Dr. Millett, Dr. Wise, Dr. Kelly, and Dr. Hutson are, in my view, contemptuous of transsexuals. There runs through their testimony an intolerance and a prejudice that is palpable.

Dr. Millett, Dr. Kelly, and Dr. Hutson seem to me to have an additional aspect to their testimony; that is, they somehow resent the intrusion of a transsexual into the aviation field. They seem to think that the respectability of aviation is compromised by the presence of a transsexual. That, incidentally, is an attitude that permeate the testimony of virtually all the defense witnesses who are associated with aviation. I find that item number three is a pretext.

Turning to item four, Eastern says that having plaintiff in the cockpit would counteract their efforts to assure the public that airline travel is safe. Well, that argument, of course, is no better than the proposition that a transsexual in the cockpit makes airline travel unsafe. It falls with the other pretexts, and that is what it is. There is no evidence of a lack of safety. There is no evidence of any rational belief on the part of Eastern that there is a safety problem.

This is the kind of argument that opponents of civil rights litigation urged back in those long-ago days when we did not have anti-discrimination laws. We cannot serve blacks in this restaurant. Nobody will come in. We cannot employ a black to drive this bus. Nobody will ride the bus. We sure

can't have any blacks carry the mail or work in a department store. We will lose customers.

Well, the American public is a lot smarter than the bigots gave them credit for being, and those predictions did not prove to be true. I am old enough to remember when there were no blacks driving buses in Chicago or virtually none, no black sales clerks in department stores, no black mail carriers. We all know the extent to which those jobs have been opened up to persons of all races and sexes and how much better a society it has made us and how the insuperable problems that were supposed to come about just did not happen. The same thing is going to happen should Karen Ulane resume her seat in the cockpit, and it will happen with the help of people of good will like some of the people who testified here in this courtroom.

Item four is a pretext.

Now, item five should probably be included as part of the hand-out material for any seminar on discrimination cases. The fifth reason is that:

> "To the extent the operation and the counseling you have undergone have been successful in changing your essential nature from male to female, it has changed you from the person Eastern has hired into a different person. Eastern would not have hired you had it known you contemplated or might in the future contemplate such an action."

Think of the significance of that last statement. Eastern would not have hired the plaintiff. Even in their state of absolute ignorance about what safety implications there might or might not be concerning transsexuality and reassignment surgery, Eastern would not have hired the plaintiff.

I read this as a virtual admission of discrimination, and in my view that discrimination is based on sex within the meaning of the statute.

Item five is also in my view inconsistent with Eastern's position that plaintiff has undergone no sex change. In any event, I find that item five, aside from being evidence of the very discrimination charged, is pretextual.

The final paragraph in the letter says that:

> "Each of these grounds represents an independent ground."

That is well and good for Eastern to say, but life does not always work out the way you want it to. In assessing the good faith of each of these separate reasons, the Court considers them together, and it is difficult to be taken seriously on one assertion when you have been shown to be frivolous on another. Now, I have indicated that I think each of these reasons considered alone and independently is a pretext, and that conclusion is heightened by the reciprocal effect these various reasons have on each other when considered together and in the context of this case. On the other hand, I find them no more convincing in combination than I do individually.

Now, why was the plaintiff really fired? What was the real reason? I conclude from the evidence I have heard in this case that Eastern thought it had a real image problem: A transsexual in the cockpit. How is that for you? What are we going to do about that? The public will not accept it. We will be the laughing stock of the airline industry. We have got to do something about it.

Without giving it very much mature thought, Eastern went into action to sever itself from this problem. It probably thought this was the way to solve it, but they took the wrong course in my view. The legal department did the directing, and the medical department did the casting and provided the props.

There has been some testimony about the plaintiff's facade and her dissembling, her manipulation. I find that the real

facade and the real dissembling and the real manipulation has been on the part of Eastern Airlines.

I want to turn now to the second discharge letter. I find that the second discharge was not a retaliation for having filed this suit or for having filed the arbitration proceedings. It was, rather, an attempt to bolster the case for discharge. Assuming there was a legitimate reason for discharge, there is nothing wrong with that. As I said yesterday, I think that is the sensible thing to do. If more ammunition comes to your attention during the course of litigation or even if there is no litigation, the sensible thing to do is to avail yourself of it. So I do not hold against Eastern in any way that it sent out the second letter. That letter, however, has to be evaluated in terms of whether it articulates a non-discriminatory reason and whether that alleged reason is or is not pretextual.

Now, the first reason in the letter of March 25, 1982, is that plaintiff failed to disclose to the company her medication and her psychiatric and medical treatment that she had had over the years for her condition. The conclusion that Eastern draws from that failure is that plaintiff, "showed a gross disregard for the safety of your fellow employees and the public at large and a consistent lack of sound judgment."

The first thing to note about this alleged reason for discharge is that the fact of the treatment and the fact of the medication was known to Eastern at the time it wrote the first letter of discharge. Granted, more detail was unearthed as a result of discovery in this case, but no additional detail threw any additional light on the question of whether that medication or that treatment had a causal relationship to any safety concern.

Now, the reason that is assigned in item one is that the alleged failure to report this information earlier showed a disregard for safety and a lack of sound judgment. Well, where is the safety hazard, and if there is no safety hazard, where is the lack of sound judgment? Again, we have a

failure to articulate, and we have a failure to provide any substance to the reason given.

The second thing about this reason is that, in fact, the drugs plaintiff was taking were not dangerous. They did not affect her ability to fly. So there is no lack of sound judgment. It is not merely a question that Eastern has failed to show that they were dangerous. I am satisfied from the evidence here and by the greater weight of that evidence that, in fact, the drugs were not dangerous in terms of either plaintiff's individual ability to pilot the airplane or any effect it might have on the passengers or crew.

Now, the third consideration in relation to item one is that there is disparate treatment here between the plaintiff and the alcoholics, all of whom are male. Captains Shipner and Helms both testified to the conspiracy of silence that there had been for years in regard to alcoholic pilots at Eastern Airlines. Pilots drank and flew. They did not disclose that to the company, obviously. They were not fired, with rare exception. The safety factor with alcohol is not unknown, which is the best Eastern can manage to say about the safety considerations in regard to female hormones. The safety factor with alcohol is well-known. If you are drunk, you do not have the physical or mental ability to fly an airplane or walk a straight line.

Did they fire these alcoholic pilots who had failed to reveal that they were drinking and had an alcoholic problem? No, they did not. But they fired the plaintiff for having taken hormones and having received psychiatric treatment for problems that have not been shown to have any relation whatsoever to safety considerations.

The final thing I consider in connection with item one and, indeed, in connection with the first discharge letter as well is the drastic nature of the discipline which was imposed upon the plaintiff: Discharge—no investigation of any substantial kind, no fair hearing, no opportunity to reform. Discharge. What a difference between the way plaintiff was treated and

the way alcoholics and males with other psychological and emotional problems have been treated by Eastern Airlines.

Dr. Jones testified without contradiction that first of all, large amounts of hormones, if ingested, are simply excreted by the body. He further testified that any ill effects of the long range kind he said could occur, such as heart trouble, if they had not occurred by the time the patient ceased taking the excessive amounts of hormones, they were unlikely to occur later. In other words, any deleterious effect that might be argued to occur from taking more hormones than medically advisable immediately ceases upon the cessation of the overdosages.

Was any consideration given to telling the plaintiff, "Look, don't take what we regard as excessive dosage of hormones any more," as the alcoholics were told, "Don't drink any more"? No, plaintiff was fired without any opportunity to satisfy any legitimate medical concern that the defendant might arguably have had. The defendant was not interested in giving the plaintiff a chance. The defendant was not interested in investigating or in following its normal procedures because it was afraid of what the results would be. It pretty well knew that those results would not bolster its already-made decision to fire the plaintiff but, rather, would undermine the legitimacy of that decision.

Now, the second reason given in the—

Let me say first that reason number one is a pretext.

Turning to reason number two, Eastern says that:

> "The failure to disclose the medications and the psychiatric treatment on the FAA applications for medical certificates shows a consistent pattern of poor judgment and willingness to endanger your fellow crew members and passengers for your own benefit."

Now, I have already indicated why this is not true and why Eastern had no basis for saying that it was true. The hormones were approved by the FAA, and the amounts that

the plaintiff was taking did not endanger anybody, and Eastern had no basis for believing otherwise. Eastern has changed its position here at the trial. Its case has continually changed as new information and new theories have occurred or become known to counsel. At trial the thrust of item number two was that plaintiff is untruthful and, therefore, cannot be trusted to give reliable information, and this actually was the foundation for much of Captain Causey's testimony: She did not reveal the medications. Therefore, how can you trust her in the cockpit?

You will recall how we went around with that and could not figure out a connection between the two things, but that is another point. What is important immediately is that this is not the reason that Eastern gave in the second firing letter. They did not say anything about untruthfulness or lack of trust. They said, "This behavior shows a consistent pattern of poor judgment and willingness to endanger your fellow crew members and passengers for your own benefit," essentially, in other words, the same reason they had given in item one of the second letter. There was nothing said about untruthfulness back at the time of the discharge. That has been added here as further justification at trial.

Now, assuming that Eastern had fired the plaintiff because of untruthfulness or assuming further that whether they did or not they can now rely on it as an additional reason for justifying the firing, we still have the question of whether that alleged untruthfulness is a pretext or not. I find that it is or would be if that were what had been relied upon. The considerations here are, of course, the disparate treatment of male alcoholics. They had certainly been untruthful during the entire time the admitted conspiracy of silence existed. Talk about endangering the flying public, talk about endangering the fellow crew members for your own benefit, talk about a legitimate reason to distrust somebody. How about flying an airplane in an intoxicated condition or with a condition of alcoholism that is untreated,

whether or not the pilot may have been drinking immediately prior to take-off.

In considering again the question of untruthfulness, it has to be evaluated in company with its neighbors, all of the other reasons which are clearly pretextual. How likely is it that we find a winner among all these losers? It is possible, but in evaluating the good faith of Eastern, I do not evaluate these reasons in a vacuum one by one.

Now, let's just assume that Eastern really does believe that the plaintiff was untruthful in her FAA applications. In fact, I think it is a very defensible position to take that the plaintiff should have revealed her psychiatric treatment and her medications on the applications. There is an argument the other way. It is clear to me that the plaintiff wanted to keep her job and concluded correctly, as it turns out, that revealing these matters would be very likely to result in the loss of that job for no reason other than the prejudice of her employer.

I do not say that that justifies any intentional failure to divulge relevant information on the application form, and I do not mean to be interpreted as excusing intentional misrepresentation or intentional omission if it is motivated by self-interest. But on the question of judgment considered alone and on the question of whether a real safety hazard was presented, I do not think that the plaintiff used poor judgment in terms of safety concerns by failing to reveal this information. But let's assume otherwise for purposes of argument.

Let's assume that she intentionally failed to reveal to the FAA information which she believed they were entitled to have. How does that differ from what the alcoholics did during the conspiracy of silence? The answer is, it does not at all. How does it differ from the failure of any other Eastern pilot with a serious emotional problem who was having psychiatric treatment to reveal that information on his application? It does not.

Here I would like to refer to the case of *McDonald* v. *Santa Fe Trail Transportation Company*, 427 U.S. 273, at 282. This is a case where two white employees were fired for stealing company property whereas a black employee who had been guilty of the same thing was not fired. The Supreme Court said this at pages 282 to 283:

> "We find this case indistinguishable from McDonnell Douglas. Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe but that a fellow employee likewise implicated was not so disciplined and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white. [Citation omitted]
>
> While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not."

Now, that case was considering the sufficiency of the complaint, but the principle is applicable here. If Eastern Airlines decides to fire pilots who are untruthful concerning relevant medical information on their FAA applications, it must fire them without regard to sex. It did not do so in the case of male pilots. It did do so in from what I can gather the sole instance of a non-male pilot who arguendo was guilty of a failure to disclose. This disparate treatment turns the alleged reason into a pretext on that basis alone.

Now, the third reason in the second letter is that plaintiff allegedly instigated publicity which was designed to embarrass Eastern Airlines. There is no substance whatever to that accusation. The publicity was made inevitable by Eastern's discharge of the plaintiff. Plaintiff had every right to file this lawsuit. Eastern clearly anticipated that it was in

for a lawsuit because it geared up for it prior to the discharge, and in view of the unusual nature of this lawsuit, publicity was inevitable.

I have a jury box here that is filled with members of the press who were not brought here by the plaintiff. The press reported the filing of this case extensively at the time it was filed. They did not learn about it from the plaintiff as far as I know. They learned about it because it was a matter of public record. So there was going to be inevitably a lot of publicity about this case whether plaintiff made herself available to the media or not.

Now, it is true that she has made herself available to the media and to other persons as well, medical persons. She has attended grand rounds with Dr. Berger and contributed to the medical education of doctors and medical students, which I think is commendable. The more that we learn about matters of this kind, the better off we are going to be.

I sat and listened to the television program that emanated from Philadelphia, and I found it to be on the whole a tasteful and educational program. I do not think the plaintiff did anything that was untoward during that interview. She conducted herself properly as did her attorney. The moderator of that program, incidentally, struck me as having a great deal more perception about the problem of transsexuality than some of the medical witnesses who tesified in the case. There is no doubt that he was a lot brighter. If there was anything that was damaging to Eastern Airlines about that program over and above whatever damage it might have suffered by the mere instigation of this litigation, it does not occur to me.

Similarly, the newspaper articles that I have read are factual, typical of newspaper articles that are written about any litigation which is of public interest and especially cases that are unusual or even unique in character. In short, much of this publicity was inevitable. Any incremental publicity occasioned by plaintiff's initiation was hardly significant in

the total picture. But let's assume that it was. Is this another pretext? Of course, it is.

I will not go into the Playboy Magazine, but we had there nude pictures of Eastern Airlines' employees, which did not bother Eastern at all. They appeared in Playboy Magazine. Here we have one picture of an Eastern First or Second Officer standing beside his wife or, rather, in one picture he is above his wife, and in another picture immediately below that, here is his wife, an Eastern stewardess, stark naked in a bathtub in Playboy Magazine with a circulation of how many millions, and not a peep out of Eastern. Captain Buttion, I think it was, is not peeping even now. I suppose that is a terrible pun, isn't it? I did not mean it that way. A clearer example of disparate treatment would be hard to imagine.

The fourth and final reason is that:

> "This notoriety would undermine Eastern's efforts to reassure passengers of the safety of airline transportation."

Here again we have a failure to articulate a comprehensible reason. The relationship between the transsexuality and the publicity about the transsexuality on the one hand and any rational safety concern on the other simply does not appear from the evidence in this case. This ground is plainly and literally nonsense as far as I can tell.

I find in summary that all of the reasons advanced by Eastern for the discharge of the plaintiff were pretextual and were not advanced in good faith.

I further find that but for being a transsexual and but for having had the transsexual surgery, the sex reassignment surgery, and adopting the life style of a woman, the plaintiff would not have been discharged.

I further find that the plaintiff was in almost every instance subjected to discriminatory and disparate treatment for conduct which was in almost every instance, if not every

instance, far less serious that that of male alcoholics whose conduct was excused by Eastern.

I turn now to the second general question, and that is whether, assuming a sex-based series of decisions on the part of Eastern, those decisions can be justified as bona fide occupational qualifications; that is, can Eastern justify the proposition that not being a transsexual and not having transsexual surgery is a bona fide occupational qualification?

In order to prevail on that theory, on which Eastern has the burden of proof, Eastern would have to prove, according to the case of *Orzel* v. *City of Wauwatosa Fire Department*, 697 F. 2d 743, Seventh Circuit, 1983, at page 753, "that the challenged sex qualification"—I am inserting "sex" for "age" in this quotation; it was an age discrimination case—"that the challenged (sex) qualification is reasonably related to the essential operation of its business and that either there is a factual basis for believing that all or substantially all (transsexuals) would be unable to effectively perform the duties of (a pilot) or that it is impossible or impracticable to determine job fitness on an individualized basis."

Eastern has proved neither of these propositions. The evidence, on the contrary, proves that neither of these propositions is true.

I am satisfied from this evidence that while some transsexuals, just as some tall people and some lefthanders, some fat people, and some Irishmen would not be safe airline pilots, it is true that some transsexuals would not be safe airline pilots. But it cannot be said with any rationality that all transsexuals are unsafe airline pilots.

Neither can it be said with any rationality that it is impossible to make this determination of whether or not a safety hazard is really involved on an individualized basis. Eastern never attempted to do anything on an individualized basis and instead attempted to justify its discrimination against the plaintiff by resort to an indefensible generalization about all transsexuals. They got whatever help they

could from plaintiff's individualized record. Wherever they could find something that they could use against the plaintiff, they threw it in, but they blinded themselves utterly to anything in the individualized record which favored plaintiff, which tended to show that she was and would be a safe pilot and, of course, failed to conduct any investigation of any kind that would be likely to reveal the truth in that regard.

I am going to enter judgment for the plaintiff, and the question is on what counts and against which defendants. Count I alleges that plaintiff was discharged because she is a woman. Count II alleges that she was discharged because she is a transsexual.

I feel more comfortable with Count II. I believe that these are truly alternate theories and that it cannot be both ways. It has got to be one or the other. The evidence much more clearly establishes in my opinion that transsexuals are entitled to protection under the act than it does that an operated transsexual is now a woman. While I would not argue with the latter proposition, the former seems to me more strongly supported by this record.

Accordingly, I am going to enter judgment against the defendants and in favor of the plaintiff on Count II, the transsexual count. In doing so, I do not mean to imply that if Count I were the only count I would not enter judgment for plaintiff on that count. I say that because one never knows "beyond a shadow of a doubt" what the Appellate Courts might do, and in the event the finding on Count II should be reversed, I would want plaintiff to be in the position of arguing alternatively that the judgment should be affirmed on Count I because upon remand in such a situation, I would enter judgment for plaintiff on Count I on the basis of the record that has already been made here.

Now, I believe that judgment is proper on Count II against all defendants but Shipner. It is not clear from the complaint just who is charged in what count, but Shipner is not alleged to have done anything that I can see in Counts I or

II. I gather he is in the conspiracy count and some of the other counts later on, but as to the remaining defendants, Eastern, Buttion, Millett—

MR. DICKIE: Excuse me, your honor. I believe it was stipulated that Title VII was against the company.

THE COURT: Against the company only?

MS. TINKER: Yes.

THE COURT: All right, that simplifies matters.

Judgment will be entered against Eastern only.

Now, as I indicated before we started this trial, I believed and still believe that this case will be greatly simplified by a determination on appeal concerning the sex discrimination counts. Either way the case went, the sensible thing to do in my view was to certify the judgment under Rule 54(b). The case is not, however, at this juncture in a posture for such certification because we do not have a final order. In order to have a final order, we cannot have merely a declaration of rights; we have got to have a judgment that is enforceable.

I am going to declare and do declare that the plaintiff is entitled to reinstatement with full seniority from the date of her discharge, all employment benefits that she would otherwise have received had she not been discharged, full back pay, and her reasonable attorneys' fees. What remains to be determined is the amount of the back pay and, of course, the amount of these benefits and her place on the roster, the possible question of mitigation of damages, all of which, it seems to me, will be fairly simple.

It seems to me that much of it can be stipulated to, but maybe not. I do not know. I urge you to get together as you have throughout this case. There has been acrimony, but I think generally speaking counsel have conducted themselves as professionals, and I am sure you will continue to do so, and you can save your clients a lot of time and expense by

cooperating in whatever further discovery might be necessary.

Plaintiff's income tax returns, for instance, should be produced on the question of mitigation or whatever other fact they may be pertinent to.

There is one more item I want to cover before I cease these brief remarks, and that is a very important misquotation that occurred in the reported version of my oral opinion when I denied the motion to dismiss. I did not even know it had been reported. Somebody sent it in, and when I read it the other day in 28 F.E.P. Cases, there is one statement that is the exact reverse of what I said or at least what I meant to say. I am going to read the statement so I can correct it now in the record.

This is at page 1439 of that report. The statement was:

> "What does seem to me apparent is that there is no way out of the conclusion that whatever the physiology may be, it has nothing to do with sex as that term is constantly understood."

Now, the word, "nothing," there totally turns on its head what I was trying to say. I am sure that I used the word, "something," and if I did not, that is what I meant to say, and I want to clarify that for future reference.

It is surprising to me that nobody caught that before it was sent in. I think I would have caught it had somebody told me they were going to send it in. I think for whatever good it might do, I will send that correction into the book publisher so that I do not go down in posterity as someone who cannot articulate a reason for a decision.

What do counsel suggest in terms of a hearing on the damage question? Do you want to think about it and let me know?

MR. DICKIE: Your Honor, I would hope that we could prepare perhaps a judgment order and work it out. We have

some other number of things to talk to Mr. Brown about. Maybe we could prepare something.

THE COURT: Well, here is what I intend to do as far as the judgment order is concerned. I intend to have these remarks transcribed. I will then read them over, correct any grammatical errors or double dangling participles and make that my findings of fact and conclusions of law, and that will be appended physically to a very short judgment order, and that will save everybody the time and effort.

I mean, the reason I took this time is I want to state the reasons for my decision, and to the best of my ability, I have done so. So do not bother preparing any additional facts or conclusions.

MR. DICKIE: What you would like is some computations.

THE COURT: Yes, exactly, but these are my findings on the liability question.

What do you think we should do, have a status call?

MR. DICKIE: We can probably do it in a week.

MR. BROWN: About a week would be fine. I take it what we are looking for would be a dollar amount concerning the back pay plus benefits.

THE COURT: Right. I think you start feeding things into the computer, and you get the answer. And, of course, this is without prejudice to Eastern's position that it is not liable for anything.

MR. BROWN: Yes.

THE COURT: I mean, all this will have no effect if the liability finding is reversed.

MR. BROWN: I think we can work it out. As a matter of fact, if you would start working on the income tax returns, we can get that done.

THE COURT: How about January 3rd at 10:00 o'clock?

MR. DICKIE: That may be just a bit soon with the holiday.

THE COURT: How about January 10th or sometime between the 3rd and the 10th? We can make it any morning you want.

MR. BROWN: The 10th would be all right.

THE COURT: That is a Tuesday. Tuesday is the 10th.

MR. DICKIE: Tuesday is the 10th, your Honor?

THE COURT: Is that all right?

MR. DICKIE: Tuesday the 10th, your Honor.

THE COURT: Tuesday the 10th at 10:00 o'clock.

MR. DICKIE: Thank you very much.

THE COURT: Thank you, counsel.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Laura M. Brennan Date

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAREN FRANCES ULANE, *Plaintiff,* v. **EASTERN AIRLINES, INC., et al.,** *Defendants.*	**NO. 81 C 4411**

MEMORANDUM OPINION

In my oral findings of fact and conclusions of law announced from the bench on December 28, 1983, I expressed an intention to find in favor of the plaintiff on Count II (discrimination against a transsexual) and against the plaintiff on Count I (discrimination against a female). It seemed to me that plaintiff had made a much better case that she is a transsexual than that she is a female. Upon further reflection, I think plaintiff may have made an equally good case on Count I. *See M.T.* v. *J.T.*, 140 N.J. Super. 77, 355 A.2d 204 (App. Div.), *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976); *In Re Anonymous*, 57 Misc.2d 813, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968); *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 Conn. L. Rev. 288 (1975); *Comment, Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963 (1971); *Comment, Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 Md. L. Rev. 236 (1971). Moreover, if I were to find against plaintiff on Count I, she would be compelled to cross appeal, and this would be anomolous. She has prevailed on her Title VII claim and should not be burdened with having to appeal the rejection of an alternative theory to support the relief granted.

Accordingly, the judgment will be in favor of plaintiff on both Counts I and II of the complaint.

DATED: February 8, 1984

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX E

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KAREN FRANCES ULANE, *Plaintiff,* v. **EASTERN AIRLINES, INC., et al.,** *Defendant.*	**NO. 81 C 4411**

SUPPLEMENTAL FINDINGS

Plaintiff has moved, pursuant to Rule 52(b) Fed. R. Civ. P., for clarification of the court's rulings in regard to Count I of the complaint. She asks for an indication that the findings supporting the conclusion that plaintiff is a transsexual also support a finding that she is a female and, further, that the findings as to sexual discrimination be made expressly applicable to Count I as well as to Count II.

The basic question in this case is whether plaintiff was discharged because of her sex within the meaning of Title VII. I found that, whether plaintiff be regarded as a transsexual or as a female, she was discharged by Eastern Airlines because of her sex. On the question of plaintiff's exact sexual status, I was satisfied from the evidence that she is a transsexual and so found. If Title VII protects transsexuals, then plaintiff is entitled to the relief awarded. On the other hand, if on appeal Title VII is held not to apply to transsexuals, then plaintiff should have a ruling on her alternative position that she is a female. As an alternative to my finding that plaintiff is a transsexual, I find that plaintiff's post operative legal status is that of a female. If on the evidence presented in this case the choices were limited to male or female, I would and do find that the evidence clearly

predominates in favor of the conclusion that plaintiff is a female, not a male. All of the evidence which supports the view that plaintiff is a transsexual also supports the finding that she is a female.

It was and is my intention that all of my findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female.

DATED: March 6, 1984

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1984.

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

KAREN FRANCES ULANE,
Plaintiff-Appellee,

No. 84-1431 **vs.**

EASTERN AIRLINES, INC., A Delaware corporation,
Defendant-Appellant.

Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.

No. 81 C 4411

John F. Grady, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed on September 18, 1984, in the above-entitled cause by counsel for plaintiff-appellee Karen Frances Ulane, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

Office-Supreme Court, U.S.
FILED
MAR 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1328

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KAREN FRANCES ULANE,

Petitioner,

v.

EASTERN AIR LINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries and affiliates of Eastern Air Lines, Inc. are:

Eastern Air Lines, S.A.
Eastern Air Lines Trading Company
EAL Properties, Inc.
Air Line Reporting Corporation
Aeronautical Radio, Inc.
Air Cargo, Inc.
Air Cargo Facilities, Inc.
Air Lines Clearing House, Inc.
Air Line Tarriff Publishers, Inc.
Arizona Fuel Facilities
Atlanta Air Terminal, Inc.
Bradley Facilities, Inc.
CATO Detroit, Michigan
CATO Evanston, Illinois
CATO Washington, D.C.
CATO White Plains, New York
Inter-American Flight Services Company
International Aeradio (Caribbean), Ltd.
Manhattan Air Terminal, Inc.
Portland Fuel Facilities
Societe Int'l de Telcom.
Tinicum Fuel Facilities Corp.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1328

KAREN FRANCES ULANE,

Petitioner,

v.

EASTERN AIR LINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Eastern Air Lines, Inc. respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the Seventh Circuit Court of Appeals.

Petitioner's statement of the case contains matters of questionable relevance to the petition. However, for the purpose of completeness and accuracy, the following additional statement is provided.

STATEMENT OF THE CASE

A. Summary

Petitioner was and is a biological male. Petitioner was employed to pilot Eastern's Boeing 727 aircraft for which he was responsible for the safe transportation of approximately 6,000 passengers each month. In mid-1979, Petitioner took a medical leave of absence in preparation for a surgical procedure to treat his psychiatric disorder classified

by the American Psychiatric Association as Trannssexualism. Many if not most practitioners consider such surgery to be experimental at best. That surgery was performed in 1980. In 1981, Petitioner requested return to flight status. After learning of Petitioner's medical background, Eastern denied that request. Instead, Eastern offered to find Petitioner continued employment with the Company in a ground position. Alternatively, Petitioner was offered medical disability retirement which included payments of $25,200 per year until at least age 60, additional retirement payments thereafter, medical, life insurance and other benefits. Both offers were refused by Petitioner and termination from employment followed. Eastern continues to employ another surgically treated transexual in a ground position where consideration of air safety do not arise.

At trial, Eastern presented extensive medical evidence concerning the psychiatric disorder of transsexualism in general, the effect of such disorder on Petitioner individually as well as the adverse effect of all of the foregoing on safety in commercial aviation. These medical and safety issues were rejected by trial court but were presented by Eastern to the Court of Appeals. At page 4 of the Petition for Certiorari, Petitioner's counsel incorrectly states the following:

> "The Court of Appeals decision makes clear that there are no medical or safety issues in this case. The Court of Appeals let stand the District Court's finding that Eastern's safety and medical concerns were completely without basis and pretextual."

In fact, the Court of Appeals did precisely the opposite of what counsel for Petitioner now contends. Because the Court of Appeals dealt with specific issues of law, it did not reach any of the additional medical or safety issues presented by Eastern. This is made clear at footnote 8 of the opinion by the Court of Appeals where it states: "Eastern presented a substantial amount of testimony and evidence at trial to prove that Ulane's discharge was not due to discrimination against her either as a trannssexual or as

a female, but we need not reach that issue." (A-4) At footnote 13 of its opinion, the Court of Appeals states the following: "Because of our holding in Section A, however, we need not and do not decide whether Eastern did actually discriminate against Ulane because of her transsexuality." (A-12)

Petitioner's suggestion that the Court of Appeals rejected Eastern's medical and safety concerns as without basis or that Eastern simply banished this pilot to the ranks of the unemployed without first attempting to reach a reasonable accommodation is inaccurate and unnecessary at this level of appellate advocacy.

B. Petitioner's Professional Background

During the entire time that Petitioner was flying as a pilot for Eastern, he was required to disclose to the Federal Aviation Administration on an annual basis a full medical history including current use of medication as well as all medical treatment received within the last five years. During the entire time that this pilot was flying for Eastern, he never disclosed any of the following facts either to the FAA or to his employer, Eastern, and in fact falsified several reports calling for the disclosure of this information. This conduct formed an additional basis for Petitioner's discharge from employment but was also an issue not reached by the Court of Appeals:

Petitioner first sought psychiatric treatment in the military in 1968 and did not disclose that fact to Eastern when he was employed as a pilot the following year. In 1970, he unsuccessfully applied for surgical treatment of his psychiatric disorder. At that time, psychological testing showed he was suffering from chronic depression with occasional suicidal thoughts. For approximately the next two years, he was under constant psychiatric care on a weekly basis. During this period of time, he also began taking the drug referred to as Estrodiol. He was simply given a large bottle containing approximately 1,000 of those pills which he took to counteract his urge to "cross-dress" as a female. After

exhausting this supply of drugs, he began treatment with another doctor in the Chicago area at which time he was unable to function unless he was either on Estrogens or wearing female clothes. The average recommended dose of Estrogens is .625 mgs. per day. When Petitioner began treatment with the new doctor, he was prescribed 1.25 mgs. Several months later, the daily intake was increased to 3.75 mgs., at which time the doctor discussed with Petitioner his concerns over such a high level of dosage. During this period of time, Petitioner was undergoing certain physical changes as a result of the Estrogens, which included the development of large breasts. His doctor recommended a mastectomy so that the Estrogen therapy would not be discovered during Petitioner's annual FAA physical examinations. By January, 1978, Petitioner had increased the daily dosage of Estrogens to 10 mgs. per day and was "feeling so badly" that the Estrogens were being administered both orally and by injection. On at least one occasion, Petitioner had to be rushed for emergency medical treatment as a result of a reaction to the drug therapy. Throughout this period of time, Petitioner had seriously contemplated suicide on many occasions.

Estrogen doses in the amount of 5 mgs. per day or more increase the risk of heart attack, pulmonary embolism, increased mental depression, stroke, and gradual or sudden loss of vision. While on such dosages of Estrogens, patients are to be considered at "clear risk" for any and all of the foregoing.

Petitioner correctly points out that he never had an "accident" while flying Eastern aircraft. However, if Petitioner ever experienced an emergency situation while flying Eastern aircraft as now contended in the Petition, such was never reported either to Eastern or the FAA, which would have been in further violation of federal regulations, company policy and basic pilot responsibility.

C. Transsexualism

Petitioner's explanation of the psychiatric disorder of transsexualism is incomplete. A review of the medical authorities cited in the decision of the Court of Appeals and as developed at a trial of this action show that the essential features of the disorder go well beyond a simple sense of discomfort as Petitioner contends. Frequently, the social and occupational functioning of the patient are markedly impaired, depression is common and it can lead to suicide attempts. Without treatment, the course of the disorder is chronic and unremitting. Since surgical treatment is still in an experimental stage, the long-term course of the psychiatric disorder with this treatment is unknown to the medical profession. The disorder is rare. Both the cause and the cure for transsexualism is unknown. Surgical treatment is not designed to cure transsexualism. At most, it is designed to give the patient some subjective relief. Even after the surgery, the person still has the psychiatric disorder. Transsexuals suffer from moderate to severe personality disturbances and, frequently, from considerable anxiety and depression. Prior to surgery, the transsexual patient is frequently suicidal and may engage in self-mutilation. The transsexual candidate is highly intelligent, very verbal and given to much fantasy. Their speech is filled with resentful comments about medicine and law and in spite of their docility, they take considerable risks. Deep depression is an "imminent danger" among both pre and post-surgical transsexuals.

The long-term medical study of post-surgical transsexuals is difficult because few patients return for follow-up studies and few such studies have been conducted. The studies that have been conducted on this subject have identified varying degrees of a return to pre-existing depressive state leading up to and including suicide.

Medical science has not advanced to the point where it can predict wth any degree of reasonable certainty whether a surgically-treated transsexual will later regret the decision and suffer psychologically debilitating results in the future.

Whether surgery should be used as a treatment of transsexuals and, if so, which patients are best suited for the surgery is an unresolved medical question and continues to be a highly controversial issue, subject to extensive debate within the medical community[1]

D. The FAA Certification Process.

After Petitioner ceased flying for Eastern in 1979, his medical certificate issued by the F.A.A. expired by its own terms. In June, 1980, Petitioner reapplied for a new certificate. At that time, the F.A.A. Medical Examiner refused to issue such a certificate on the basis that Petitioner was unfit for flight duties. Several months later, the F.A.A. reconsidered that determination and eventually issued Petitioner a medical certificate valid for approximately 90 days and subject to repeated psychiatric examinations "with emphasis on your emotional adjustment as it relates to your flying activities." Whether the certificate would ever be renewed was subject to the following: "If during the surveillance period there have been no adverse findings, a determination will be made regarding the need for continued surveillance of your mental health status."

Prior to this case, neither the F.A.A. nor any commercial air carrier had ever had experience with pilots with the diagnosed psychiatric disorder of transsexualism.[2]

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[1] Additionally, the ability to distinguish between transvestites & transsexuals is extremely difficult. On March 1976 Petitioners Psychiatrist stated "I do not see this man as transsexual in any way. He seems to be a transvestite . . ." He just changed that diagnosis to Transsexualism in February 1980, just two months before surgery was performed.

[2] Arguably, Eastern did have the experience of Pilot Ulane's service with the company. That service was hallmarked by a repeated failure to disclose obviously serious psychiatric problems and to place at risk every flight to which he had been assigned. His failure to disclose past medical problems including falsification of records to cover-up the same makes it virtually impossible for any air carrier to rely on this individual to disclose any future problems, whether relating to his psychiatric disorder or even a totally unrelated medical problem. Trustworthiness and reliability are attributes of a commercial pilot at least as important as the ability to mechanically manipulate the controls of an aircraft.

SUMMARY OF ARGUMENT

A. Transsexuals Are Not Protected Under Title VII of the Civil Rights Act of 1964.

This holding by the Court of Appeals was correctly based on its review of the legislative history leading to the enactment of Title VII, the numerous unsuccessful legislative attempts to expand the narrow definition of "sex" as contained in that statute as well as 20 years of judicial authority including identical holdings by the Eighth and Ninth Circuits.

Petitioner appears to now have conceded the correctness of this holding but seeks to avoid its affect by arguing that those transsexuals which can financially afford cosmetic surgery to treat the symptoms of the disorder can acquire a new and different sex within the meaning of the statute. That argument runs contrary to this Court's repeated admonition that statutes should be interpreted to avoid untenable distinctions and unreasonable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63 at 71 (1982).

B. One Cannot "Change Sex" for Purposes of Title VII.

The Seventh Circuit, as well as the Eighth and Ninth Circuits, correctly concluded that the term "sex" as used in Title VII is to be given its plain and traditional meaning of *biological* sex, i.e., that immutable characteristic with which each is endowed at birth. Congress has repeatedly rejected attempts to expand the definition of the word "sex" in Title VII. Therefore, Petitioner's position is an invitation for this Court to enter into a legislative function. Petitioner's argument for the expansion of the scope of Title VII should be addressed to the Congress where the social, economic and

even religious aspects of the issue may be more fully debated and considered.

Furthermore, the suggestion that the definition of the word "sex" in Title VII should be given a more subjective judicial interpretation which would include the ability to change biological sex creates a burden on all employers subject to the act which is both unjust and unworkable as part of a national labor policy. Such a subjective approach would logically extend to national origin and even race. If a change in these traditional notions of immutable characteristics is to be thrust upon employers, it should be done only after the use of the legislative process, which to date the Congress has refused to do.

Finally, a male transsexual retains the male sex for purposes of Title VII and can state a cause of action for discrimination against a male but not against a female. Sex, for purposes of Title VII, is immutable. To hold otherwise would be to provide to transsexuals super status under Title VII. They could claim coverage as both male and female, a result not enjoyed by non-transsexuals and certainly not intended by the Congress.

C. The Court Below Did Not Violate Its Appellate Authority.

Even if a biological male could "become a female" for Title VII purposes, the Court of Appeals correctly concluded that there was no evidence to support a finding of discrimination on that basis even if such a finding had been made by the trial court. There is nothing in the Court of Appeals decision that would even suggest that it reversed a specific finding of fact on less than a clearly erroneous standard. Sufficiency of evidence, or lack thereof, is a question of law properly within the jurisdiction of any appellate court. The Court of Appeals did not consider the weight of the evidence which was the error committed by the Fifth Circuit in the *Pullman-Standard* case.

ARGUMENT

I. TRANSSEXUALS, INCLUDING THOSE WHO ATTEMPT TO "CHANGE SEX," ARE NOT PROTECTED BY TITLE VII.

A. Courts Have Narrowly Defined the Term "Sex"

Petitioner contends that the word "sex" as it appears in Title VII should be given an expansive interpretation beyond the traditional concept of biological sex. Petitioner urges the Court to accept what some commentators and the trial court below have characterized as "psychological sex," i.e., our sex is determined by how we perceive ourselves as weli as how we are perceived by others. This Court has not addressed the meaning of the word "sex" as it appears in Title VII. However, in the case *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, (1973) this Court observed the following in a case alleging discrimination against service women in violation of the due process clause of the Fifth Amendment:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . 411 U.S. at 686, 93 S. Ct. at 1770.

That same traditional interpretation of the word "sex" has been adopted by every Court that has considered the meaning of the word wthin the Title VII context. The Fifth Circuit Court of Appeal summarized the uniformly accepted approach to the proper interpretation of the Congressional intent behind Title VII in *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) as follows:

> Save for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either

> beyond the victim's power to alter . . . or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics.

This same limited definition of sex as the "immutable personal characteristic which one acquires at birth" will be found in the following Title VII cases dealing with issues other than transsexualisms: *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) *cert. denied* 422 U.S. 1046 (1975); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2nd Cir. 1976); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

With these authorities as background, every Court that has considered the issue has refused to extend Title VII protection to transsexuals including those who have attempted to voluntarily alter their original "immutable" sex with which they were endowed at birth. The Ninth Circuit Court of Appeals addressed the issue in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). In rejecting the argument which Petitioner now makes to this Court, the Ninth Circuit observed the following:

> Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congresssional mandate . . . A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This Court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate. 566 F.2d at 663-64.

The Eighth Circuit Court of Appeals rejected Petitioner's argument for a "psychological sex" approach to Title VII in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982). In rejecting the claim of a biological male who claimed employment discrimination based on a newly-acquired female sex, the Eighth Circuit stated the following:

> Although this Circuit has not previously considered the issue raised on this appeal, we are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. 667 F.2d at 750.

The Third Circuit Court of Appeals' approach to this issue is represented in *Grossman v. Bernards Township Board of Education*, 11 EPD ¶10, 686 (D.C.N.J. 1975) *affd.* 538 F.2d 319 (3rd Cir. 1976). In that case a biological male transsexual school teacher had been discharged by the local school board after undergoing a "sex reassignment operation." Plaintiff alleged that the operation had changed his sex to that of a female for Title VII purposes, and that "she" had been unlawfully discriminated against because of her newly acquired female sex. The Third Circuit affirmed the trial court's dismissal of the Complaint on the basis that it failed to state a claim of unlawful job discrimination based on "sex" under Title VII.

The numerous Federal District Court decisions which have reached the same result are cited at length in the Seventh Circuit's decision in this case and will not be repeated here.

B. Legislative History and Subsequent Attempts to Amend Title VII.

The legislative history concerning the inclusion of the word "sex" in Title VII has also been reviewed at length in the decision of te Court of Appeals in this case. Like all other Courts before it, the Seventh Circuit has correctly declined the invitation to expand the definition of sex discrimination within the context of Title VII in the absence of further action from the Congress. The reasoning for de-

clining to do so is summarized by the Fifth Circuit Court of Appeals in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (en banc) where the following was stated:

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

Not only has Congress refused to give such a mandate, it has specifically declined numerous attempts to expand the definition of sex discrimination beyond its traditional meaning.

The Seventh Circuit in this case reviewed literally dozens of attempts to amend Title VII to expand the definition of "sex discrimination" to cover such concepts as affectional or sexual orientation. The phrase "sexual orientation," if it had successfully been added to Title VII, would at least arguably have been broad enough to cover transsexuals as well as the "psychological sex" approach which Petitioner now urges to this Court. Congress has repeatedly and consistently refused to so extend the statutory protection of Title VII with full knowledge of the judicial approach set forth above.

Certainly, with this background the Seventh Circuit Court of Appeals correctly concluded that to accept Petitioner's position in this case would go beyond the realm of statutory interpretation and into the realm of legislating.

C. The E.E.O.C. Has Consistently Rejected Petitioner's Position.

All of Petitioner's "sex discrimination" claims were presented to and rejected by the Equal Employment Opportunity Commission as beyond its jurisdiction. Furthermore, the E.E.O.C. has also accepted the position that "when Congress used the word 'sex' in Title VII, it was referring to a person's gender, an immutable characteristic with which a person is born." EEOC Decision No. 76-75, CCH EEOC Decisions (1983) ¶6495 (1976).

Thus the Commission has taken the position that Title VII does not extend coverage to transsexuals or to those who allege discrimination for having undergone a "sex change operation." EEOC Decision No. 76-67, CCH EEOC Decisions (1983) ¶6493 (1976); EEOC Decision No. 75-030, CCH EEOC Decisions (1983) ¶6499 (1975).

While the Commission's interpretation of the application of Title VII is certainly not binding upon this Court, it is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

II. PETITIONER CANNOT "BECOME A WOMAN" FOR TITLE VII PURPOSES — A PRACTICAL APPROACH.

As this Court has recently observed in *American Tobacco Co. v. Patterson*, 456 U.S. 63 at 71 (1982), statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible. The Court of Appeals decision is consistent with this observation. Petitioner's contention that a biological male can change sex for purposes of Title VII is not.

The subjective definition of sex which Petitioner urges to this Court has no place in a statute which forms an integral part of this country's national labor policy. If such policy should embody the concept that an employee can "change sex," how is an employer or indeed the Courts or the Commission expected to know at what point this change of sex has actually taken place. When does a biological male employee become a female employee for Title VII purposes? Certainly it could not be solely at the point that surgical castration takes place. If such an individual continues to dress, act, speak and otherwise present himself in a male role, the employer could never determine, either for its af-

firmative action program or otherwise, whether it is dealing with a male or female.

Similarly, if this Court should judicially determine that sex actually changes at the time of surgical castration under the form of a "sex reassignment" operation, does that not itself create an additional form of economic discrimination? The surgery which Petitioner refers to is expensive. The testimony in this record is that the plastic surgeon alone charges as much as $10,000 in addition to the charges by the hospital and psychiatrists. Certainly it would be inequitable to define sex on the basis of the economic ability to pay.

The illogical extension of Petitioner's position does not end here. If one can change sex, either through cosmetic surgery or otherwise, then the same can also be said of national origin and indeed even race. These otherwise immutable characteristics can certainly be changed through cosmetic surgery, chemistry, dress, appearance and lifestyle to the same extent as can sex. If Petitioner can "become a woman" for Title VII purposes, an individual could also use the same techniques to become an American Indian, a Mexican-American, an Oriental and presumably even a Black American. Such ability to change would be limited only by the ability of medical science to affect these changes through cosmetic surgery or otherwise.

Finally, after two decades, it is clear that Title VII protection for women and minorities was and is premised on a basic concept of fairness. Since sex, race and national origin are involuntarily acquired solely by reason of birth, such qualities should have no adverse impact on employment. Once the involuntary nature of these qualities is removed, there would no longer be reason for statutory protection. The decision to allow employees to choose a particular sex, race or national origin is more properly within the legislative realm where all social, economic, medical and even religious aspects can be more fully debated and considered.

It is respectfully submitted that Petitioner's position is untenable and that the Circuit Court correctly concluded

that if the term "sex" as it is used in Title VII is to mean more than biological male or biological female, that new definition must come from the Congress.

III. THE COURT OF APPEALS DID NOT REVERSE A DISTRICT COURT'S FINDING OF FACT ON LESS THAN THE CLEARLY ERRONEOUS STANDARD.

The Circuit Court concluded that *even if* a biological male could "become a female," there was no evidence to support a finding of such discrimination in this case. Since Title VII does not cover such a change of sex, Petitioner's challenge to that aspect of the Court's decision is moot. However, it will be responded to briefly.

This Court's decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), to which Petitioner refers was obviously directed at a practice that had developed in the Fifth Circuit Court of Appeals in distinguishing between "subsidiary facts" which could be reversed only if clearly erroneous and "ultimate facts" which the Fifth Circuit had come to conclude could be reversed on appeal even if they were pure issues of fact which were not clearly erroneous. Nowhere in the decision of the court below is there the slightest suggestion that the "subsidiary fact" vs. the "ultimate fact" dichotomy addressed in *Pullman-Standard* was utilized in any respect whatsoever in reversing Plaintiff's claim of discrimination against a female. Most important, there is not the slightest suggestion that the Court below reversed any finding of fact by the trial court on anything other than a clearly erroneous standard.

What the court below did do is to identify the *failure* of the trial court to make specific findings of fact capable of supporting a finding of discrimination against a female as opposed to discrimination against a transsexual. After identifying that void in the trial court's findings, the appellate court reviewed the entire record before it and concluded that "it is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female,

but because Ulane is a transsexual." To have remanded the case to the lower court for entry of findings of fact for which there was no evidence in the record and then to subsequently review such findings on appeal and reverse them as clearly erroneous would have been the ultimate useless act. The procedure followed by the appellate court below is that which has historically been followed and repeatedly sanctioned by every federal appellate court in the system. It is elementary that where a record before the appellate court is susceptible of only one reasonable interpretation, remand is totally inappropriate. In such cases, "effective judicial administration" requires that the Court of Appeals draw the inescapable factual conclusion itself rather than remand the case to the district court for further needless proceedings. *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Bigelow v. Virginia*, 421 U.S. 809, 826-827 (1975); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 62 at 170 (1967).

Ironically, the manner in which the Seventh Circuit treated Petitioner's contention that she was discriminated against because she was a female was the same treatment which the trial judge originally adopted at the conclusion of his oral findings delivered on December 28, 1983 and which appeared at C-34 of Petitioner's Appendix. At the conclusion of the trial court's orally-delivered findings of fact and conclusions of law, he had concluded that Petitioner was discriminated against as a transsexual. At no time during those findings did the trial court ever conclude that Petitioner was either a female or had been discriminated against on that basis. He specifically concluded his findings with the following observation:

> I'm going to enter judgment for the plaintiff and the question is on what counts and against what defendants. Count I alleges that plaintiff was discharged because she is a woman. Court II alleges she was discharged because she is a transsexual.
>
> I feel more confortable with Count II. *I believe that these are truly alternative theories and that it cannot be both ways. It has got to be one or the other.* The evidence much more clearly establishes in my opinion that transsexuals are entitled to protection under the Act than it does that an operated transsexual is now a woman. (Emphasis supplied).

This reasoning used by the trial judge is essentially the reasoning applied by the court of appeals on Petitioner's claim of discrimination against "a female." Even if Petitioner could legally "become a woman" for Title VII purposes (an issue of law which has been addressed above), such a claim could not be supported by the evidence in view of the conclusion that discrimination was based on the status of a transsexual rather than a female.

The only relevant procedural event that occurred after the Court's findings in December, 1983, was that in March, 1984, the court entered supplemental findings at the invitation of Petitioner. Obviously no new evidence was taken as the record was closed in December. Of significance is the fact that those "supplemental findings" were limited to the conclusion that "all of the evidence which supports the view that plaintiff is a transsexual will also support the findings that she is a female." However, the trial judge made no specific findings that Ulane had actually been *discriminated against* on the basis of being female. This lack of necessary findings on that issue was identified by the Court of Appeals. Petitioner does not argue with that portion of the Court's opinion. What Petitioner does argue with is the fact that the Court of Appeals reviewed the entire record and concluded that even if such a finding of discrimination against a female had been made, there was no evidence to support it. In the words of the Court: "It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she was female . . . ."

Respectfully, if a fact is "clear from the evidence," then a contrary fact would be "clearly erroneous." Petitioner is merely engaging in semantics in support of this aspect of the Petition and the argument is without substance.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 84-1328

In The

Supreme Court of the United States

October Term, 1984

KAREN FRANCES ULANE, *Petitioner,*

vs.

EASTERN AIR LINES, INC., *Respondent.*

On Petition for a Writ of Certiorari to The Seventh Circuit Court of Appeals

PETITIONER'S REPLY BRIEF AND REQUEST FOR SUMMARY REVERSAL BASED ON *ANDERSON v. CITY OF BESSEMER*

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KAREN FRANCES ULANE, *Petitioner,*

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EASTERN AIR LINES, INC., *Respondent.*

ANDERSON v. BESSEMER CITY REQUIRES SUMMARY REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS ON COUNT I

On March 19, 1985, this Court issued its decision in *Anderson v. Bessemer City*, No. 83-1623, reaffirming the rule that a district court's finding of intentional discrimination in an action brought under Title VII of the Civil Rights Act of 1964 is a finding of fact that may not be set aside unless clearly erroneous. The holding and teaching in *Anderson* on the limits of appellate review of the findings of fact by a district court underscore the necessity for granting the pending petition for a writ of certiorari and mandate that the judgment of the Court of Appeals on Count I be summarily reversed.

The district court found that Ms. Ulane was discriminated against as a female (Count I). The Seventh Circuit reversed the judgment on Count I because it believed the subsidiary findings did not support the ultimate finding that Ms. Ulane was discriminated against as a female. *Anderson* confirms petitioner's position, as fully stated in her Petition, that the Seventh Circuit abused its appellate authority in reversing

the finding of fact that Ms. Ulane was discriminated against as a female.[1]

In reversing the district court's finding of discrimination against Ms. Ulane as a female, the Seventh Circuit violated this Court's command in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As this Court emphasized just last week in *Anderson*, "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception." Slip op. at 10. The Seventh Circuit has violated this rule by reversing the factual finding of discrimination, without even paying lip-service to Rule 52(a) of the Federal Rules of Civil Procedure, and without any analysis of the evidence and the district court's subsidiary findings which support its ultimate finding that the petitioner was discriminated against as a female.

In *Anderson*, this Court explained the limits of an appellate court's power to review the district court's findings of fact:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Slip. op. at 8. The Seventh Circuit, like the Fourth Circuit in *Anderson*, reversed the district court's finding of discrimination because it took a different view of the evidence. Paying even less heed to Rule 52(a) than did the Fourth Circuit in *Anderson*, the Seventh Circuit in the pending case failed to

[1] The Seventh Circuit also reversed the judgment on Count II, which was based upon discrimination against Ms. Ulane as a transsexual. Because *Anderson* requires reversal of Count I, this Court need not reach the issues of statutory interpretation raised by Count II.

provide any analysis of what evidence supported its conclusions, or what findings of the district court were illogical or implausible. As far as one can tell from the Seventh Circuit's one-page discussion, it simply believed that its own interpretation of the evidence was the better one. Under *Anderson*, unless clearly erroneous, the district court's interpretation must control.

The Seventh Circuit's opinion sidesteps the strict requirements of the clearly erroneous standard by contending that the district court made no factual findings to support the conclusion that Eastern discriminated against Ms. Ulane because of her sex.[2] As described fully in the Petition, the

[2] Eastern Air Line's Brief makes the same error. However, in addition to ignoring the clearly erroneous standard, Eastern attempts to retry its case in this Court, just as it did in the Seventh Circuit. Indeed, Eastern's "Statement of the Case" contains a host of false assertions which were expressly rejected as unworthy of belief by the district court and which are unworthy even of rebuttal here. Suffice it to say that in the 17 days of trial testimony, the district court heard abundant evidence concerning all the "facts" which Eastern's brief recites. The district court found that "[t]he safety concerns that Eastern purports to have been cognizant of appear to be readily dispelled when confronted with the facts." *See* Appendix C to Petition, at 17. The court found each of Eastern's purported reasons for the discharge to be pretextual (Appendix C, at 32). Indeed, after weighing extensive medical and psychiatric testimony on the subject of transsexuality in general and Ms. Ulane in particular, the district court concluded that, notwithstanding her transsexuality, Ms. Ulane was better qualified to fly than Eastern's average pilot (Appendix C, at 14).

As this Court reminded the Fourth Circuit in *Anderson*, "the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road"'." Slip op. at 9-10. Eastern presented its evidence at the "main event" in the district court, and its evidence was not persuasive. Its attempt to retry its case in either the Seventh Circuit or in this Court should not be sanctioned.

district court's findings of fact are replete with examples of disparate treatment between this female pilot and male pilots. Rather than analyze these findings under the careful and deferential standard required by Federal Rule of Civil Procedure 52(a) and *Anderson*, the Seventh Circuit pretends the findings do not exist. It substitutes its interpretation for that of the district court and, without any discussion of specific evidence or the appropriate standard of review, concludes that "[i]t is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual. . . ." (Appendix A, at 12). The district court, after 17 days of live testimony, reached a different conclusion. *Anderson* mandates that the district court's interpretation prevail.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the judgment of the Court of Appeals on Count I.

Respectfully submitted,

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